Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OMNIPOINT COMMUNICATIONS ENTERPRISES, L.P.,

Petitioner,

—v.—

NEWTOWN TOWNSHIP AND
THE ZONING HEARING BOARD OF NEWTOWN TOWNSHIP,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case involves an interpretation of the section within the federal Telecommunications Act of 1996 that makes it unlawful for municipal authorities to prohibit the provision of personal wireless services. 47 U.S.C. § 332(c)(7)(B)(i)(II). The court of appeals held that when a zoning ordinance prevents a wireless telecommunications carrier from providing service within a municipality, the Act is not violated unless all other carriers also are without service at the same location. The questions presented are:

1. Whether the Telecommunications Act permits local authorities to limit personal wireless services to one provider per municipality, thereby precluding service to all other providers' customers residing there, visiting or traveling through, notwithstanding the Act's intent to foster competition and facilitate widespread deployment of innovative wireless services.

2. Whether a claim under the Civil Rights Act can be based upon a violation of the Telecommunications Act.

PARTIES TO THE PROCEEDING

The caption of this case contains the names of all parties to the proceeding in the court whose judgment is sought to be reviewed.

A corporate disclosure statement is not required by Rule 29.6 because the petitioner is a partnership, not a corporation. However, it should be noted that VoiceStream Wireless Corporation ("VoiceStream") indirectly owns a 49.9% interest in the petitioner.[1] In addition, VoiceStream has entered into a merger agreement with Deutsche Telekom AG ("Deutsche") and VoiceStream and Deutsche have entered into merger agreements with Powertel, Inc.

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[1] The remaining 50.1 percent is owned by Cook Inlet Region Inc., a corporation owned by 7,000 Alaska shareholders of Eskimo, Indian and Aleut descent.

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PETITION FOR WRIT OF CERTIORARI

Omnipoint Communications Enterprises, L.P. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a) is reported at 219 F.3d 240. The opinions of the district court have not yet been published in the official reporters, but the initial opinion (App. 14a) is reported at 1999 WL 269936 and the opinion denying reconsideration (App. 39a) is reported at 1999 WL 387205.

JURISDICTION

The court of appeals entered its judgment on July 13, 2000 (App. 1a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND ORDINANCE INVOLVED

The Telecommunications Act of 1996 provides in pertinent part that "The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof -- ... Shall not prohibit or have the effect of prohibiting the provision of personal wireless services." 47 U.S.C. § 332(c)(7)(B)(i)(II). The entire section is included in the appendix to this petition (App. 46a), together with the pertinent provisions of the Civil Rights Act (App. 57a), 42

U.S.C. § 1983, and the applicable zoning ordinance (App. 58a), Newtown Township, Pa., Zoning Code § 172 (Jan. 6, 1997).

STATEMENT OF THE CASE

This is a case of first impression for this Court, regarding conflicting interpretations of the federal Telecommunications Act of 1996. 47 U.S.C. § 332(c)(7)(B)(i)(II). The primary goals of the Act are to increase the availability and improve the quality of wireless telephone services throughout the country by facilitating the development of the necessary infrastructure and fostering competition among the providers. In order to avoid interference with those goals, the Act does not allow municipalities to take any action that has "the effect of prohibiting the provision of personal wireless services." Id.

Nevertheless, the court of appeals has ruled that if there is already one company providing coverage, a municipality *may* prohibit service by all other competing providers. That decision is contrary to the plain language and intent of the Act and numerous decisions by other courts of appeals and district courts throughout the county. If this Court does not overturn the decision, it will severely restrict the ability of wireless service providers to complete their networks and compete as contemplated by the Act.

The underlying dispute began when Newtown Township ("Township") and the Zoning Hearing Board of Newtown Township ("Zoning Board") used a local zoning ordinance to prevent Omnipoint Communications Enterprises, L.P. ("Omnipoint") from installing telecommunications antennas on the rooftop of an apartment building in Newtown Square, Pennsylvania.

Omnipoint provides personal communications services over a network of wireless telecommunications facilities, pursuant to a license from the Federal Communications Commission. Like all such providers, Omnipoint is in the process of building out its network to make wireless services more widely available, as mandated by the terms of its license. To do so, it must install facilities in many different municipalities throughout the regions it is licensed to serve.

Portable telephones operate by transmitting a very low power radio signal between the telephone and antennas mounted on towers, poles, buildings or other structures. The antennas feed the signal to electronic radio devices housed in equipment cabinets located near the antennas, where the signal is connected through a switching station to ordinary telephone lines and then routed anywhere in the world.

An array of antennas and their equipment cabinet are commonly known as a base station or cell site. The area served by the cell site is referred to as a cell. In order to provide continuous service to a telephone user, there must be a series of overlapping cells in a grid pattern approximating a honeycomb.

Omnipoint's engineers use complex computer programs to complete a propagation study, which shows where a cell site needs to be located, based on the boundaries of the cell, the topography of the land, and other factors. Once a potential site is identified, Omnipoint's engineers also perform a "drive test" with radio equipment, to verify that the site actually will provide sufficient coverage throughout the cell.

In order for the entire system to be operational, there must be enough cells with properly placed cell sites installed and functioning so that complete coverage can be realized. Only when the entire system is operational can a user have an uninterrupted conversation when traveling from cell to cell throughout a given territory.

In order to provide service in Newtown Square, Pennsylvania and surrounding areas, Omnipoint needed to establish a cell site there. To that end, it entered into a lease with the owner of an apartment building known as Newtown Towers. The antennas were to be concealed inside an inconspicuous fiberglass canister that was only 5½ feet tall and 18 inches wide. The necessary elevation would be achieved by installing the canister on the roof of a six-story building situated on a steep hill.

Omnipoint applied for a building permit to install its antennas on the apartment building's rooftop. However, the Township denied the application. Omnipoint appealed that decision by filing an application for a hearing with the Zoning Board.

At the hearing, Omnipoint presented uncontradicted testimony establishing that:

- A cell site was needed in Newtown Township to fill a gap in Omnipoint's coverage there, including portions of major thoroughfares known as West Chester Pike and Route 252;

- The Newtown Towers apartment building was the only existing structure in Newtown Township on which antennas could be installed that would be capable of filling the gap in

coverage, due to its height and specific location;

- The failure to allow the antennas to be placed on the rooftop would have the effect of prohibiting Omnipoint from providing personal wireless services in the relevant area; and

- The antennas would not have any detrimental effect on the health, safety, and welfare of the surrounding neighborhood.

Omnipoint also pointed out that the applicable zoning ordinance could not be relied upon to support a denial of Omnipoint's application because it violated the Telecommunications Act by not allowing such facilities *anywhere*.[2] Under those circumstances, a variance should have been granted to allow the installation. However, the Zoning Board denied Omnipoint's application.

Omnipoint then filed this action against the Township and the Zoning Board in the United States District Court for the Eastern District of Pennsylvania, alleging that they violated the Telecommunications Act of 1996, 47 U.S.C. § 332, the Civil Rights Act, 42 U.S.C. § 1983, and Pennsylvania's Municipalities Planning Code, Pa. Stat. Ann. tit. 53, § 10101 *et seq.*[3]

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[2] See Omnipoint Communications Enter., L.P. v. Newtown Township, No. 98-CV-5171, 1999 WL 269936, at *4 (E.D. Pa. Apr. 29, 1999) ("Plaintiff is therefore precluded from placing the antennas that it needs to provide coverage anywhere within the Township.").

[3] Federal jurisdiction was provided by 28 U.S.C. §§ 1331 and 1337 with respect to the Telecommunications Act claim, 28 U.S.C. §§ 1331 and 1343 with respect to the Civil Rights Act claim, 28 U.S.C. § 1367(a) with respect to the state law claims and 28 U.S.C. § 1332 with respect to all of the claims.

Upon completion of discovery, both sides filed motions for summary judgment.

The district court granted Omnipoint's motion on the Telecommunications Act claim, ruling that the ordinance violated the Act because it "has the effect of prohibiting the placement of the antennas necessary for plaintiff to provide continuous service to its customers." Omnipoint Communications Enter., L.P. v. Newtown Township, No. 98-CV-5171, 1999 WL 269936, at *4 (E.D. Pa. Apr. 29, 1999).

However, the district court also held, contrary to the weight of authority, that a claim under the Civil Rights Act cannot be based upon a violation of the Telecommunications Act. The court reasoned that the Telecommunications Act provides a "comprehensive mechanism for enforcement" that did not need to be supplemented by § 1983, and that awarding damages would "unfairly place[] a burden on the taxpayers." Id. at *10.

A timely appeal was filed by the Township, and Omnipoint filed a timely cross-appeal.

The court of appeals reversed the Telecommunications Act decision based on a new requirement it had recently imposed in APT Pittsburgh Ltd. P'ship v. Penn Township, 196 F.3d 469 (3d Cir. 1999). According to APT, in order to find that a zoning decision has the "effect of prohibiting" service, a court must first determine that there are "significant gaps in the availability of wireless service." 196 F.3d at 480. For a gap to be deemed significant, the court ruled, a service provider must prove that "the area the new facility will serve is not already served by another provider." Id. at 480. Because the district court

did not apply that new standard, its decision in favor of Omnipoint on the Telecommunications Act claim was reversed. As a result, the court of appeals did not reach the merits of the Civil Rights Act decision or the state law claim.

REASONS FOR GRANTING THE PETITION

The standard applied by the court of appeals in this case is in direct conflict with the standards applied by several other courts of appeals (which also conflict with each other). As such, a decision by this Court is necessary to provide much needed uniformity within the federal courts, especially given the importance of the issue and the frequency with which it is litigated.

Moreover, the court of appeals' decision contravenes important national policies expressed by Congress and, if not corrected, will cripple the wireless communications industry, jeopardize public safety and deprive consumers of the ability to communicate without interruption while traveling through different municipalities on state and federal highways. A decision of this magnitude is worthy of the Supreme Court's review.

A. The Court of Appeals Has Entered a Decision in Conflict with the Decisions of Several Other Courts of Appeals on the Same Important Matter.

The court of appeals' decision here conflicts with numerous cases throughout the country in its ill-advised interpretation of the provision within the Telecommunications Act that makes it unlawful for municipal authorities to prohibit personal wireless services. 47 U.S.C. § 332(c)(7)(B)(i)(II). Most importantly, the court of appeals

held that in order to prove a prohibition of wireless services under the Act, a plaintiff must "include evidence that the area the new facility will serve is not already served by another provider." 219 F.3d at 244.

As defined by the court of appeals, therefore, a finding of prohibition under the Act requires proof that *all* carriers are without service in a given area, not just the carrier asserting the claim. (For the sake of convenience, Omnipoint will refer to this new standard as the "all carriers" requirement.) That standard was used here to reverse the district court's finding of prohibition even though the applicable zoning ordinance bars telecommunications facilities from being erected *anywhere* within the township's borders.

None of the other courts of appeals that have considered prohibition claims under the Telecommunications Act impose the "all carriers" requirement. Each circuit seems to have its own approach, all of which are inconsistent with each other.

The fourth circuit addressed the issue first in AT & T Wireless PCS, Inc. v. City Council of Virginia Beach, 155 F.3d 423 (4th Cir. 1998). It held there that an individual zoning decision cannot form the basis for a prohibition claim. In its view, a general ban or blanket prohibition is required to establish a violation of the Act. 155 F.3d at 428.

The first circuit disagreed in Town of Amherst, N.H. v. Omnipoint Communications Enter., Inc., 173 F.3d 9 (1st Cir. 1999). It held there that a violation can be based on an individual zoning decision, in the absence of a formal ban, by a "showing of such fixed hostility by the Board that one

can conclude that further applications would be useless." 173 F.3d at 14.

The second circuit rejected both of those approaches in Sprint Spectrum L.P. v. Willoth, 176 F.3d 630, 641 (2d Cir. 1999) (reasoning that the entire general ban standard "does not fit well or easily within the statutory scheme"). It held instead that "local governments must allow service providers to fill gaps in the ability of wireless telephones to have access to land-lines," but may reject an application "if the service gap can be closed by less intrusive means." 176 F.3d at 643.

The third circuit addressed the issue next in APT Pittsburgh Ltd. P'ship v. Penn Township, 196 F.3d 469 (3d Cir. 1999). It purported to agree with Willoth generally, but actually gutted the second circuit's standard by adding the "all carriers" requirement, holding that in order to prove a prohibition of wireless services under the Act, a plaintiff must "include evidence that the area the new facility will serve is not already served by another provider." 196 F.2d at 480. That view that one carrier per municipality is enough conflicts with all of the other approaches.[4]

Most recently, in 360 degrees Communications Co. of Charlottesville v. Board of Supervisors of Albemarle County, 211 F.3d 79, 87 (4th Cir. 2000), the fourth circuit conceded that the first circuit's hostility standard might

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[4] The APT decision was followed in this case even though it also conflicts with intervening precedent within the same court of appeals. See Cellular Tel. Co. v. Zoning Bd. of Adj. of Ho-Ho-Kus, 197 F.3d 64 (3d Cir. 1999) (correctly focusing only on users of the particular provider's services and not imposing the "all carriers" requirement).

suffice in some cases, but flatly rejected the views of the second and third circuits.[5]

The district courts also have applied a myriad of conflicting standards, all of which are inconsistent with the third circuit's decision in this case. See, e.g., Omnipoint Communications MB Operations, LLC v. Town of Lincoln, No. Civ. A. 99-11012, 2000 WL 1089511 (D. Mass. Aug. 2, 2000) (holding that in order to prove prohibition, an applicant need not show a general ban or that wireless services are totally unavailable); SNET Cellular, Inc. v. Angell, 99 F. Supp. 2d 190 (D.R.I. 2000) (holding that in order to show prohibition, an applicant must show "from language or circumstances" that the current application has been rejected and that further applications would be futile); Industrial Communications & Elec., Inc. v. Town of Falmouth, No. 98-397, 2000 WL 761002 (D. Me. May 9, 2000) (stating that a general ban on telecommunications services is not necessary to show prohibition, but the applicant must show that further reasonable efforts would be fruitless); APT Minneapolis, Inc. v. Eau Claire County, 80 F. Supp. 2d 1014 (W.D. Wisc. 1999) (holding that a single decision may result in a "de facto" ban on personal wireless services and thus violate the statute); Sprint Spectrum L.P. v. Mills, 65 F. Supp. 2d 148 (S.D.N.Y. 1999) (finding that a single denial of an application constitutes impermissible prohibition); Sprint Spectrum, L.P. v. Board of County

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[5] The fourth circuit characterized the decisions by the second and third circuits as applying a "least intrusive means to close a significant gap in service" test, which it rejected because in its view: "This interpretive rule effectively creates a presumption, shifting the burden of production to the local government to explain its reason for denying such an application." 211 F.3d at 87. According to the fourth circuit, that "reads too much into the Act, unduly limiting what is essentially a fact-bound inquiry." Id.

Commn'rs of Jefferson County, 59 F. Supp. 2d 1101 (D. Colo. 1999) (stating that a violation of the statute occurs where local policies or attitudes have the effect of prohibiting personal wireless services; and evidence regarding all carriers is not required); APT Minneapolis, Inc. v. City of Maplewood, No. 97-2082, 1998 WL 634224 (D. Minn. Aug. 12, 1998) (holding that a city's actions have the effect of prohibiting wireless services when it denies a carrier's applications at the only two feasible sites); Smart SMR of New York, Inc. v. Zoning Comm'n of Stratford, 995 F. Supp. 52 (D. Conn. 1998) (stating that evidence from all carriers is not required to find prohibition); Sprint Spectrum L.P. v. Jefferson County, 968 F. Supp. 1457 (N.D. Ala. 1997) (stating that a refusal to permit deployment of digital technology constitutes unlawful prohibition); Western PCS II Corp. v. Extraterritorial Zoning Auth. of Santa Fe, 957 F. Supp. 1230 (D.N.M. 1997) (stating that the denial of a single application amounts to prohibition in service and denies the applicant an opportunity compete in the area at issue).

In short, the federal courts are in need of definitive guidance on the proper way to interpret the "prohibition" provision of the Act. Given the volume of cases brought throughout the country under this key provision, the Supreme Court should clarify the applicable standard.[6]

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[6] Although a split in authority also exists regarding the Civil Rights Act claim, it has not yet "percolated" to the courts of appeals. See Omnipoint Communications Enter., L.P. v. Newtown Township, 219 F.3d 240, 245 (3d Cir. 2000) (observing that "whether a violation of the Civil Rights Act can be based on a violation of the Telecommunications Act is an intriguing issue of first impression," but declining to decide the issue); see also AT&T Wireless PCS, Inc. v. City of Atlanta, 210 F.3d 1322 (11th Cir. 2000), vacated by, 2000 WL 1210663 (11th Cir. Aug. 25, 2000) (agreeing with Omnipoint's position, but later vacating the decision on jurisdictional grounds). Accordingly, Omnipoint does not

B. The Court of Appeals Has Decided an Important Question of Federal Law that Has Not Been, but Should Be, Settled by this Court.

In 1999 alone, the number of Americans using personal wireless services increased from 69.2 million to 86.0 million, or approximately *32 percent* of our country's entire population.[7] The "all carriers" requirement that was applied in this case will significantly impair the usefulness of wireless technologies for the vast majority of those consumers and severely damage the business of all wireless service providers. It also contravenes important national policies established by the Telecommunications Act of 1996 and the Wireless Communications and Public Safety Act of 1999.

1. The Decision Will Cripple the Personal Wireless Services Industry, to the Detriment of Millions of Consumers and Businesses.

Each carrier providing "personal wireless services" under the Act is licensed by the FCC to provide services in a unique frequency range. Accordingly, each carrier's network is unique, and in most instances *one carrier's phone will not*

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assert that certiorari should be granted based on the conflict in authorities regarding the Civil Rights Act issue. However, the question is squarely presented in this case and should be addressed if certiorari is granted for any of the other reasons asserted.

[7] See Fed. Communications Comm'n, FCC 00-289, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Services (2000), at 5-6. See also Pradnya Joshi, Cell Phones Reach Mainstream, Detroit News, May 22, 2000 (describing pervasive use of cell phones, and noting that the "wireless market is starting to look like America").

work with another carrier's network.[8] Thus, when only one carrier has service in an area, users of most other carriers' phones will have no service there.

If the court of appeals' decision stands, the first provider to establish coverage in an area will deprive all other carriers of the right to challenge decisions prohibiting them from providing service to that same area. Local officials will take full advantage of that limitation because their constituents almost always insist that cell sites be placed in someone else's neighborhood.[9]

If only one carrier is allowed in each municipality, the country will be divided up like a multicolored mosaic with a random pattern, where some users will have service only on the blue tiles, some only on the red, some only on the green, some only on the yellow, and so on. An uninterrupted conversation would be nearly impossible as a user travels throughout a given region and moves into and out of the areas serviced by different carriers.

In order to solve that problem, a user would have to purchase service from several competing carriers at the same time and continuously change phones while traveling through different municipalities, because all the carriers would have gaps in different places. No one could have an uninterrupted conversation with a single phone while traveling down a state or federal highway.

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[8] Only if they both happen to use the same 1 of 4 incompatible technologies could a connection be established, with roaming charges, at a much higher cost.

[9] See Jeff Gelles, Concern Over Cell-Phone Reliability Generates Suits, Calls for Legislation, Phila. Inq., Aug. 10, 2000, at F1 (describing difficulties associated with building out network footprint).

The inevitable effects of such a scenario are obvious. The usefulness of wireless telephones will be drastically impaired, consumers will lose the benefit of advanced wireless technologies[10] and the business of service providers will be severely damaged. It is difficult to imagine a greater threat to the telecommunications industry.

2. The Decision Is Anti-Competitive, Contrary to the Essential Purpose of the Telecommunications Act.

The court of appeals' decision here gives the first carrier to arrive in a locality an effective monopoly on service there, because if one carrier covers an area, all others can be prohibited from covering the same area. That is *anti-competitive*, in direct contradiction to the Act. See Goldwasser v. Ameritech Corp., No. 98-1439, 2000 WL 1022365, at *1 (7th Cir. July 25, 2000) (stating that the Telecommunications Act embodies a "competition-friendly regime[]" that "represents a comprehensive effort by Congress to bring the benefits of deregulation and competition to all aspects of the telecommunications market in the United States, including especially local markets"); 360 degrees Comm. Co., 211 F.3d at 85-86 (stating that "Congress enacted the Telecommunications Act 'to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid

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[10] In many cases, it will be impossible to prove that no other carrier has service, because the now outdated analog service has been offered for more than a decade, since long before the enactment of the Telecommunication Act of 1996. Thus, the "all carriers" requirement also will stunt the growth of advanced digital systems by favoring the oldest and least beneficial technology, merely because it was there first.

deployment of new telecommunications technologies'" (quoting Pub. L. No. 104-104, 110 Stat. 56, 56 (1996))).

Indeed, the overarching purpose of the Telecommunications Act of 1996 is to foster competition among providers in order to benefit the general public. Illustrations from the debates on the Act highlight the centrality of competition and open markets to the Act's framers. As stated by Representative Linder (R. Ga.): "The goal of our telecommunications reform legislation is to encourage competition that will produce innovative technologies for every American household and provide benefits to the American consumer in the form of lower prices and enhanced services." 142 Cong. Rec. H1145-06, H1146 (daily ed. Feb. 1, 1996) (statement of Rep. Linder). Representative Dreier (R. Calif.) spoke with equal enthusiasm about the Act:

> First and foremost, the success of this conference demonstrates that in a bipartisan way there is an understanding that competition works. It clearly creates a great opportunity to create jobs, creates an opportunity to benefit the consumer, which is what we want to do. We want to provide the widest range of choices, and that is exactly what is going to happen here.

Id. at H1147 (statement of Rep. Dreier).

President Clinton emphatically echoed the remarks made in the House of Representatives when he signed the bill into law: "This landmark legislation . . . reform[s] our telecommunications laws in a manner that leads to competition and private investment, promotes universal service and open access to information networks, and

provides for flexible government regulation." Statement by President William J. Clinton upon Signing S. 652, 32 Weekly Comp. Pres. Doc. 218 (Feb. 12, 1996). The President went on to state that the Act "emphasi[zes]" and "promotes competition as the key to opening new markets and new opportunities." Id.

Far from "encourag[ing] competition," or providing the "widest range of choices," or promoting "universal service," the decision here rewards the first carrier to arrive in a given area with exclusive service, at the expense of all other carriers and their customers. That is not what the Act intends. Consumers should not have to choose a carrier based on which one's gaps in coverage are in the least inconvenient places.[11] Each carrier needs to build a complete network of its own for the goals of the Telecommunications Act to be realized. Competition can then be properly focused on price, features and quality of service.[12]

3. The Decision Disturbs the Delicate Balance Struck by Congress Between Federal and Local Interests.

The Telecommunications Act was designed to achieve the national goal of rapidly deploying wireless technologies with a minimum of disruption to land-use

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[11] See Jeff Gelles, Concern Over Cell-Phone Reliability Generates Suits, Calls for Legislation, Phila. Inq., Aug. 10, 2000, at F1 (describing consumer concern over "dead spots" in cell phone networks).

[12] See Simon Barker-Benfield, Competition Helps Make Cell Phones an Affordable Purchase for Most Consumers, Fla. Times-Union, Oct. 31, 1999, at H1 (describing benefits to consumers of competition among wireless service carriers; "prices are still going down and will decline further as carriers compete for customers").

policies and procedures of local governments. As explained in 360 degrees:

> While Congress sought to limit the ability of state and local governments to frustrate the Act's national purpose of facilitating the growth of wireless telecommunications, Congress also intended to preserve state and local control over the siting of towers and other facilities that provide wireless services. It struck a balance between the national interest in facilitating the growth of telecommunications and the local interest in making zoning decisions with its enactment of § 704(a) of the Telecommunications Act, 47 U.S.C. § 332(c). Under that section, authority to regulate siting and construction of telecommunications towers is preserved in state and local governments, see 47 U.S.C. § 332(c)(7)(A), but these decisions are subject to certain limitations, see 47 U.S.C. § 332(c)(7)(B). These limitations include prohibitions against discriminating among wireless service providers and against banning personal wireless services altogether. See 47 U.S.C. § 332(c)(7)(B)(i).

211 F.3d at 86.

Congress intended to allow local governments to decide where telecommunications facilities must be placed within their borders as long as they allow them *somewhere* that will enable the service to be provided. What they cannot do is disallow them everywhere. That is why the zoning ordinance in this case is plainly violative of the Act. The

third circuit has upset the intended balance by adding the additional "all carriers" requirement that allows local governments to prohibit service by most carriers with impunity.

4. The Decision Frustrates Recent Public Safety Legislation Designed to Save Thousands of Lives and Billions of Dollars.

If allowed to stand, the court of appeals' decision also will thwart the national public policy expressed by the Wireless Communications and Public Safety Act of 1999, the stated purpose of which is "to encourage and facilitate the prompt deployment throughout the United States of a seamless, ubiquitous, and reliable end-to-end infrastructure for communications, including wireless communications, to meet the Nation's public safety and other communications needs." Pub. L. No. 106-81, § 2(b) (1999). Congress recognized in enacting that legislation that *wireless networks save lives*:

> The Congress finds that--
>
> (1) the establishment and maintenance of an end-to-end communications infrastructure . . . will reduce response times for the delivery of emergency care, assist in delivering appropriate care, and thereby prevent fatalities, substantially reduce the severity and extent of injuries, reduce time lost from work, and save thousands of lives and billions of dollars in health care costs.
>
> * * *

> (6) the construction and operation of seamless, ubiquitous, and reliable wireless telecommunications systems promote public safety and provide immediate and critical communications links among members of the public; emergency medical service providers and emergency dispatch providers; public safety, fire service and law enforcement officials; transportation officials, and hospital emergency and trauma care facilities.

Id. § 2(a).

Congress has therefore made the deployment of wireless networks a national priority. That priority is frustrated by the third circuit's "all carriers" requirement, because it allows local officials to keep most providers out of their municipalities. The resulting patchwork would deprive most users of service at most locations. That runs directly contrary to the important goals of the Wireless Communications and Public Safety Act of 1999.

CONCLUSION

The court of appeals' decision conflicts with other appellate decisions, impairs important national policies established by Congress and deals a devastating blow to the personal wireless services industry and the public. If the decision is not corrected, telecommunications carriers will be unable to complete their networks, users will be unable to communicate as they travel, consumers will lose the benefit of competition among carriers, and public safety will be compromised.

Accordingly, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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SEPTEMBER 5, 2000

APPENDIX

APPENDIX

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Pertinent Portions of the Newtown Township Zoning Ordinance, Newtown Township, Pa., Zoning Code § 172 (Jan. 6, 1997) 58a

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 99-1453, 99-1455 and 99-1458

OMNIPOINT COMMUNICATIONS ENTERPRISES, L.P.
v.
NEWTOWN TOWNSHIP; ZONING HEARING BOARD OF NEWTOWN TOWNSHIP

Appellants in No. 99-1453

OMNIPOINT COMMUNICATIONS ENTERPRISES, L.P.
Appellant in No. 99-1455
v.
NEWTOWN TOWNSHIP; ZONING HEARING BOARD OF NEWTOWN TOWNSHIP

OMNIPOINT COMMUNICATIONS ENTERPRISES, L.P.
v.
NEWTOWN TOWNSHIP; ZONING HEARING BOARD OF NEWTOWN TOWNSHIP

Appellants in No. 99-1458

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civ. No. 98-CV-05171)
Magistrate Judge: Honorable Charles B. Smith

Argued
March 20, 2000

Before: MANSMANN, GREENBERG and ALARCON,* Circuit Judges.

(Filed July 13, 2000)

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* Honorable Arthur Alarcon of the United States Court of Appeals for the Ninth Circuit, sitting by designation.

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OPINION OF THE COURT

MANSMANN, *Circuit Judge*

*1 Newtown Township appeals the District Court's order directing it to allow Omnipoint to install antennas for its Personal Communications System at a designated site within Newtown. Newtown claims that the District Court erred in concluding that its zoning ordinance has the impermissible effect of prohibiting the provision of personal wireless services, in violation of the Telecommunications Act. Further, Newtown claims that the District Court erred in finding that the Zoning Hearing Board's findings and conclusions relating to whether there was a violation of the Telecommunications Act were not supported by substantial evidence. Omnipoint defends the District Court's conclusion and cross-appeals the District Court's conclusion that the enforcement procedures of the Telecommunications Act foreclose a civil rights remedy under 42 U.S.C. § 1983.

With respect to Newtown's prohibition of the provision of wireless services, the determination must be made, first, about whether there is, in fact, a "significant gap" whereby Newtown is not adequately provided with wireless service, and second, if there is a gap, whether according to Omnipoint's plan, the least intrusive means would be used to bridge it. We conclude that the record

before the District Court was insufficient to determine whether or not there is a "significant gap" in wireless services and thus whether or not Newtown's zoning ordinances violated the Telecommunications Act by effectively prohibiting the provision of personal wireless services. We need not, and do not, reach the question of whether the least intrusive means were proposed by Omnipoint to bridge any gap, nor do we reach the section 1983 issue. We will vacate and remand to the District Court with instructions that it remand this case to the Zoning Hearing Board to reconsider the proposed facility in compliance with this opinion, as well as our opinions in *APT Pittsburgh Ltd. Part. v. Penn Tp. Butler County of Pennsylvania*, 196 F.3d 469 (3rd Cir. 1999) and *Cellular Tel. v. Zoning Bd. of Adj. of Ho-Ho-Kus*, 197 F.3d 64 (3rd Cir. 1999).

I.

Omnipoint provides personal communications services, essentially portable telephone service, over a network of wireless telecommunications facilities. To provide continuous service to its customers, there must be a series of overlapping cells in a grid pattern. Currently, Omnipoint has a gap in its coverage in Newtown Township and surrounding areas. To fill this gap, Omnipoint entered into a lease allowing it to install antennas on the Newtown Towers apartment building's rooftop. Omnipoint then applied for a building permit to install the antennas, which Newtown's Zoning Officer denied, on the ground that, under Newtown's Zoning Ordinance, the proposed antennas are not a permitted use or accessory use in the Apartment-Office District, the district in which Newtown Towers is located.

Omnipoint appealed the decision to the Zoning

Hearing Board of Newtown, based upon both the Zoning Officer's finding that the antennas were not a permitted or accessory use and an alleged violation of the Telecommunications Act, 47 U.S.C. § 332(c)(7)(B). Following public hearings through the spring of 1998, the Zoning Hearing Board denied Omnipoint's appeal.

*2 Omnipoint then filed an action in District Court against Newtown Township, alleging a violation of the Telecommunications Act, a violation of the Civil Rights Act, and a violation of state zoning law. The parties filed Cross-Motions for Summary Judgment.

The District Court granted Omnipoint's Motion for Summary Judgment and denied Newtown's Motion for Summary Judgment; the District Court, nevertheless, denied Omnipoint's claim for attorney's fees under the Civil Rights Act, and granted Newtown's Motion for Summary Judgment as to this claim only.

Our standard of review upon the grant of summary judgment is plenary. *Horowitz v. Federal Kemper Life Assur.*, 57 F.3d 300 (3rd Cir. 1995) On review, an appellate court is required to apply the same test the District Court should have used initially. Id. Summary judgment is appropriate if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is not any genuine issue as to a material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). One of the rule's principal purposes is to dispose of factually unsupported claims or defenses. *Celotex v. Catrett*, 477 U.S. 317, 325 (1986). In considering a motion for summary judgment, we examine all the evidence in the light most favorable to the non-moving party. *Anderson v. Liberty*

Lobby, 477 U.S. 242, 257 (1986). Summary judgment must be granted if the party responding to the motion fails "to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." *Celotex*, 477 U.S. at 323. When the moving party does not bear the burden of proof, summary judgment is warranted by demonstration of an absence of facts to support the non-moving party's case. *Id.* at 325.

[1] The Telecommunications Act was an "overhaul of the federal regulation of communications companies." *Cellular Tel. v. Oyster Bay*, 166 F.3d 490, 492-93 (2d Cir. 1999). It was designed:

> to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced technologies and services ... by opening all telecommunications markets to competition....

Id. at 493 (quoting H.R.Conf.Rep. No. 104-458, at 206 (1996)). As the District Court stated, the Act was intended to promote competition by limiting the ability of local authorities to regulate and control the expansion of telecommunications technologies. For example, under the Act, courts review telecommunication zoning denials more closely than standard zoning decisions. *Oyster Bay*, 166 F.3d at 493.

Two provisions of the Act are at issue in this case. The first provision at issue here provides:

> The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof--

* * *

*3 (II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

47 U.S.C. S 332(c)(7)(B)(i)(II) (Supp.III). With respect to this provision of the Act, Omnipoint claims that the City's decision has the effect of prohibiting personal wireless services.

Omnipoint's second claim, that regarding "substantial evidence," arises under the following provision:

Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.

47 U.S.C. S 332(c)(7)(B)(iii) (Supp. III 1997).

II.

[2] On appeal, Newtown challenges the District Court's holding in Omnipoint's favor that the Newtown zoning ordinances had the effect of prohibiting the provision of personal wireless services in violation of the Telecommunications Act, because it left Omnipoint unable to fill its gap in service.[13] Omnipoint had challenged

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[13] The evidence in the District Court showed that the zoning ordinance might permit antennae in the Light Industrial Zone, but that space in the Zone might be unobtainable for other reasons. We need not

Newtown's Zoning Hearing Board's denial of permission to construct communications antennae as violating the Telecommunications Act, because under the zoning ordinances the antennae are not a permitted use anywhere within Newtown.

While the Telecommunications Act recognizes local governments' right to exercise their land use authority over personal wireless services, 47 U.S.C. § 332(c)(7), it places both substantive and procedural limitations on this authority. Principally at issue here is the Telecommunications Act's provision that "[t]he regulation of the placement, construction or modification of wireless service facilities by any State or local government or instrumentality thereof ... shall not prohibit or have the effect of prohibiting the provision of wireless services." 47 U.S.C. § 332(c)(7)(B). The Telecommunications Act also includes the procedural safeguards that any decision adverse to a wireless provider be in writing and that the decision must be supported by "substantial evidence". 47 U.S.C .(c)(7)(B)(iii). Omnipoint alleges that the Zoning Board's decision in this case was not supported by "substantial evidence."

Omnipoint has presented evidence of a gap in coverage in its wireless services in Newtown and surrounding areas, including portions of the West Chester Pike and Route 252. Omnipoint argues that if the Zoning Board's decision leaves a "significant gap" in wireless services, section 332(c)(7)(B)(i)(II) has been violated. Newtown argues that a mere gap is not sufficient, and that rather, there must be a "significant gap" as to all wireless services and not within the service of a single wireless

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examine this issue further, because it is immaterial to the standard by which we determine the existence of a "significant gap."

provider.

[3] The District Court, in deciding this case, did not have the benefit of our recent decisions within which this case fits squarely, *Cellular Tel. v. Zoning Bd. of Adj. of Ho-Ho-Kus*, 197 F.3d 64 (3d. Cir. 1999) and *APT Pittsburgh Ltd. Part. v. Penn Tp.*, 196 F.3d 469 (3rd Cir. 1999). These decisions support Newtown. We held in *Ho-Ho-Kus*, 197 F.3d at 70, that "local zoning policies and decisions have the effect of prohibiting wireless services if they result in 'significant gaps' in the availability of wireless services." We also held in APT Pittsburgh, nevertheless, that "it is necessary for the provider to show more than that it was denied an opportunity to fill a gap in its service system." *APT Pittsburgh*,[14] 196 F.3d 469 at 480. The question in this case is whether a decision which creates a gap in one cellular provider's service violates section 332(c)(7)(B)(i)(II) when other providers serve the area. We held in APT Pittsburgh that in such a case,

> *4 the relevant gap, if any, is a gap in the service available to remote users. Not all gaps in a particular provider's service will involve a gap in the service available to remote users. The provider's showing on this issue will thus have to include evidence that the area the new facility will serve is not already served by another provider.

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[14] Under *APT Pittsburgh*, showing a "significant gap" in service satisfies the first prong of the test. Under the second prong, the provider "must also show that the manner in which it proposes to fill the significant gap in service is the least intrusive on the values that the denial sought to serve." 196 F.3d at 480. As we find the record insufficient to determine whether there was or was not a "significant gap" in service, we need not examine the manner in which Omnipoint proposes to fill it.

196 F.3d at 480.

[4] We held in *Ho-Ho-Kus* "that there is a 'gap' in personal wireless services when a remote user of those services is unable either to connect with the landbased national telephone network, or to maintain a connection capable of supporting a reasonably uninterrupted communication," *Ho-Ho-Kus*, 197 F.3d at 70, and reiterate here that the doctrine prohibiting gaps is designed to protect the users, not the carriers. The question then remains as to whether other providers already serve the area at issue in this case.

At the Zoning Hearing Board, Newtown put forth evidence that other cell phone providers had coverage without gaps. For example, there was evidence that Sprint had good service throughout Newtown, without gaps in coverage. Omnipoint did not contradict Newtown's assertions on this point and did not put forth any evidence either there, or in the District Court, as to whether other cell phone providers had gaps in their service in the Newtown area.

Newtown urges us to take an activist approach and to find that as to the community of cell phone providers serving Newtown, there were not any gaps. We will decline to do so.[15] Lacking the guidance of our decision in *Ho- Ho-Kus*,

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[15] Omnipoint also beseeches that we could find in its favor without returning the case to the District Court. Omnipoint prods us to find that Newtown's ordinance effectively prohibits the proper placement of not only an additional cell site, but of all cell sites anywhere in the township. The fact remains, however, that we focus upon the end result to the consumers and their reception of uninterrupted wireless telephone

and in particular, in *APT Pittsburgh*, the Zoning Hearing Board did not make findings on the issue of gaps among other providers. Under these circumstances, the record before the District Court was not sufficiently developed. We cannot agree with the District Court's conclusion, therefore, that the Zoning Hearing Board's denial had the effect of prohibiting the provision of personal wireless services.

Because the Zoning Hearing Board did not make findings on the issue of gaps among other providers in Newtown, we cannot fault the conclusion of the District Court, made with a different basis, that the Zoning Hearing Board's findings and conclusions were not supported by the "substantial evidence" required by the Telecommunications Act. Nevertheless, we must return this matter to the District Court for the application of the appropriate standard.

III.

[5] In its cross-appeal, Omnipoint asserts that the District Court erred in holding that a claim under the Civil Rights Act, 42 U.S.C. § 1983 cannot be based on a violation of the Telecommunications Act. Omnipoint asserts that Newtown acted under color of state law when it violated Omnipoint's rights under the Telecommunications Act. This presents an interesting question, the resolution of which could benefit Omnipoint greatly, primarily because the Civil Rights Act could potentially provide Omnipoint with an additional remedy, the recovery of attorney's fees, otherwise not available under the Telecommunications Act.

*5 [6] Though whether a violation of the Civil Rights

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service, and thus, Omnipoint's argument, failing to address the test in *APT Pittsburgh*, is unavailing.

Act can be based on a violation of the Telecommunications Act is an intriguing issue of first impression, we will not reach it now. The ripeness doctrine prevents us from "entangling [our]selves in abstract disagreements." *Abbott Labs. v. Gardner*, 387 U.S. 136 (1967). The Civil Rights Act question is not ripe in light of our decision to remand the case to the District Court and from there, to the Zoning Hearing Board, to determine if Newtown violated the Telecommunications Act under the test outlined in *APT Pittsburgh*. Depending on the decisions there, this issue may become moot. *See In re School Asbestos Litig.*, 977 F.2d 764, 796 (3d Cir. 1992).[16]

IV.

In sum, we vacate the District Court's grant of summary judgment to Omnipoint and affirm the District Court's grant of summary judgment to Newtown. We remand to the District Court with instructions that it remand to the Zoning Hearing Board to reconsider the proposed facility in compliance with this opinion, as well as our opinions in *APT Pittsburgh* and *Ho-Ho-Kus*. As we did in *Ho- Ho-Kus*, 197 F.3d 75, we note that the Telecommunications Act requires the Board to act "within a reasonable period of time." 47 U.S.C. § 332(c)(7)(B)(ii).

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

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[16] Under the same ripeness analysis, we agree with the District Court that Omnipoint's state law claim is premature.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 99-1453, 99-1455 and 99-1458

OMNIPOINT COMMUNICATIONS ENTERPRISES, L.P.
v.
NEWTOWN TOWNSHIP; ZONING HEARING BOARD OF NEWTOWN TOWNSHIP

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OMNIPOINT COMMUNICATIONS ENTERPRISES, L.P.
v.
NEWTOWN TOWNSHIP; ZONING HEARING BOARD OF NEWTOWN TOWNSHIP

Appellants in No. 99-1458

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civ. No. 98-CV-05171)
Magistrate Judge: Honorable Charles B. Smith

Argued

March 20, 2000
Before: MANSMANN, GREENBERG and
ALARCON,* Circuit Judges.

(Filed July 13, 2000)

JUDGMENT

These causes come on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and were argued on March 20, 2000.

On consideration whereof, it is now here ORDERED AND ADJUDGED by this Court that the order of the District Court entered in April 29, 1999 be, and the same is hereby vacated and the case is remanded to the District Court for further proceedings in accordance with the opinion of this Court. Costs taxed against appellee Omnipoint. All of the above in accordance with the opinion of this Court.

ATTEST:

s/

Clerk

Dated: July 13, 2000

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* Honorable Arthur Alarcon of the United States Court of Appeals for the Ninth Circuit, sitting by designation.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

OMNIPOINT COMMUNICATIONS ENTERPRISES, L.P., Plaintiff	:	CIVIL ACTION
vs.	:	FILED: April 29, 1999
NEWTOWN TOWNSHIP, and ZONING HEARING BOARD OF NEWTOWN TOWNSHIP Defendants	:	NO. 98-5171

MEMORANDUM AND ORDER

CHARLES B. SMITH
UNITED STATES MAGISTRATE JUDGE

*1 Presently before the Court are Cross-Motions for Summary Judgment. For the reasons that follow, I will grant plaintiff Omnipoint's motion and deny the defendant's Motion for Summary Judgment. However, the plaintiff's claim for attorney's fees under the Civil Rights Act is denied and I will grant the defendant's Motion for Summary Judgment as to this claim only.

I. FACTUAL HISTORY

Plaintiff, Omnipoint Communications, LTD, is a business which provides to its customers personal communications services ("PCS") over a network of wireless telecommunications facilities. In order to provide continuous

service to its customers, there must be a series of overlapping cells in a grid pattern. Currently, Omnipoint has a gap in its coverage in Newtown Township and surrounding areas, including portions of West Chester Pike and Route 252. In order to fill this gap, Omnipoint entered into a lease agreement with Daniel T. Mullray, allowing them to install antennas on the rooftop of an existing apartment building known as Newtown Towers, Building C, at 3400 West Chester Pike, Newtown Square, PA. Plaintiff then applied for a building permit to install the antennas, which the Township's Zoning Officer denied by letter dated November 14, 1997. The Zoning officer indicated that under the Township's Zoning Ordinance, the proposed antennas are not a permitted use or accessory use in the A-O (Apartment Office) District, the district in which the Newtown Towers Apartments are located.

Plaintiff appealed the Zoning officer's decision by filing an application to the Zoning Hearing Board of Newtown Township on December 15, 1997. The application was an appeal of the Zoning Officer's denial of the building permit based on the finding that it was not a permitted or accessory use. In addition, plaintiff also alleged a violation of the Federal Telecommunications Act of 1996, 47 U.S.C. § 332(c)(7)(B).

Public hearings were held on April 16, 1998, May 6, 1998, May 29, 1998, June 30, 1998, and July 16, 1998. Present at the hearings were George Asimos, Esq. on behalf of plaintiff, Bruce Irvin, Esq. on behalf of Newtown Township, John Prodoehl, Jr., Esq. on behalf of a local resident, Marie Tittermary, and another resident, Regina Siberski, appeared pro se. After hearing testimony from numerous witnesses and experts, the Board denied the Plaintiff's appeal in a writing issued August 31, 1998. The

Zoning Board issued findings of Fact and Conclusions of Law on September 2, 1998.

Plaintiff then filed this action in District Court against defendant, Newtown Township, alleging a violation of the Telecommunications Act, violation of The Civil Rights Act, and a violation of state zoning law. The parties have filed Cross-Motions for Summary Judgment and oral argument was entertained on the motions on April 14, 1999.

II. STANDARD OF REVIEW

Federal Rule of Civil Procedure 56(c) states that summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Williams v. Borough of West Chester, 891 F.2d 458, 463-464 (3d Cir. 1989). A factual dispute is "material" only if it might affect the outcome of the case. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). For an issue to be "genuine", a reasonable fact finder must be able to return a verdict (or render a decision) in favor of the non-moving party. Id. On summary judgment, it is not the court's role to weigh the disputed evidence and decide which is more probative. Brewer v. Quaker State Oil Refining Co., 72 F.3d 326, 331 (3d Cir. 1995). Rather, the court must consider the evidence, and all reasonable inferences which may be drawn from it, in the light most favorable to the non-moving party. United States v. Diebold, Inc., 369 U.S. 654, 655 (1962); Tigg Corp. v. Dow Corning Corp., 822 F.2d 358, 361 (3d Cir. 1987); Baker v. Lukens Steel Co., 793 F.2d 509, 511 (3d Cir. 1986). If a conflict arises between the evidence presented by both

sides, the court must accept as true the allegations of the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. at 255.

*2 Notably, however, Rule 56(e) sets forth the burden of the nonmoving party as follows:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule must set forth the specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Fed.R.Civ.P. 56(e). See Roa v. City of Bethlehem, 782 F. Supp. 1008, 1014 (E.D.Pa.1991) (a party resisting a motion for summary judgment must specifically identify evidence of record which supports her claim and upon which a verdict in her favor may be based.) With respect to an issue on which the non-moving party has the burden of proof, the burden on the moving party may be discharged by "showing"--that is, pointing out to the district court-- that there is an absence of evidence to support the nonmoving party's case. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986).

This case is appropriate for summary judgment because there are no issues of material fact remaining. The issues that remain can appropriately be resolved through these motions.

III. DISCUSSION

FEDERAL TELECOMMUNICATIONS ACT

The Telecommunications Act ("TCA" or "The Act") clearly acknowledges the right of local governments to exercise their land use authority over personal wireless services. See 47 U.S.C. § 332(c)(7). However, it places both substantive and procedural limitations on local land use authority. The Act provides that "[t]he regulation of the placement, construction or modification of wireless service facilities by any State or local government or instrumentality thereof (I) shall not unreasonably discriminate among providers of functionally equivalent services; and (II) shall not prohibit or have the effect of prohibiting the provision of wireless services." 47 U.S.C. § 332(c)(7)(B). There are also two procedural safeguards included within the Act. First, it requires that any decision adverse to a wireless provider be in writing and second, the decision must be supported by "substantial evidence". 47 U.S.C. (c)(7)(B)(iii). Plaintiff alleges that the Zoning Board's decision in this case violates both substantive limitations and was not supported by "substantial evidence".

Substantive limitations:

Plaintiff alleges that the Zoning Board has unreasonably discriminated among providers of wireless service, in violation of 47 U.S.C. § 332(c)(7)(B)(i)(I). In order to prove unreasonable discrimination under the Telecommunications Act, a plaintiff must demonstrate both unequal treatment and that there was no basis for the unequal treatment. See Sprint Spectrum L.P. v. Jefferson County, 968 F. Supp. 1457, 1467-68 (N.D.Ala.1997). Plaintiff claims it has been treated unfairly because it's request for a permit to install antennas was denied, thus preventing it from providing continuous service to its customers. Plaintiff

points to the fact that several other companies have erected antennas in the Township.

*3 While it appears to be clear from the record that other companies have installed antennas in Newtown Township, this does not establish that plaintiff has been unfairly discriminated against in violation of the TCA. In fact, plaintiff has been treated exactly the same as one of its competitors. AWACS/Comcast, one of the companies that now has antennas within the Township, previously applied for a permit to install its antennas in the exact location for which plaintiff is now seeking its permit. The Zoning Board denied AWACS's request, just as it did plaintiff's in this case, and AWACS then installed its antennas in a different location. The fact that defendant has permitted antennas to be installed in other locations within the Township, even though they may not be permitted by the ordinance, does not demonstrate unfair discrimination. The intent of the Act was "to insure that a State or local government does not in making a decision regarding the placement, construction and modification of facilities of personal wireless services...unreasonably favor one competitor over another." Omnipoint v. City of Scranton and Zoning Hearing Bd. of Scranton, 1999 WL 661110 (M.D.Pa) (quoting H.R. Conf. Rep. No. 104-458, 104th Cong., 2d Sess. 208 (1996)). The denial of plaintiff's application is not sufficient to demonstrate unfair discrimination against plaintiff in favor of a competitor and does not demonstrate unequal treatment in violation of the TCA.

Plaintiff also alleges that the Township has violated 47 U.S.C. § 322(c)(7)(B)(i)(II), the provision of the Telecommunications Act that bars any regulatory conduct that prohibits or has the effect of prohibiting personal wireless service. Plaintiff claims that under the zoning

ordinance, the antennas are not a permitted use anywhere within the Township, with the possible exception of the area zoned Light Industrial.

The testimony revealed that the only area where the zoning ordinance might actually allow the antennas is the area zoned Light Industrial.[17] The only land zoned Light Industrial in the area that could provide coverage for plaintiff is owned by a single owner, SAP America, who indicated to plaintiff that it was not interested in negotiating a lease (Tr. at 345-46, App. 23). The Township argues that plaintiff's failure to negotiate a lease with SAP America may be due to the fact that it only offered to pay half of what it agreed to pay for the Newtown Towers lease. However, the letter admitted at the hearing, which was signed by a SAP America representative, did not state that they were unhappy with the offer, but indicated that they were not willing to negotiate (Tr. at 345-46, App. 23). There was also testimony regarding a portion of the property being used for a Township road. This road would not consume the entire piece of land, but might have contributed to the owner's reluctance to enter into any negotiations regarding a lease.

The fact that a single owner holds the only land where a given use is permitted gives that owner the ability to negotiate an unreasonable price or to simply preclude the use. The zoning in effect, creates a monopoly with the owner

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[17] There was a stipulation entered into by Mr. Irvine, Counsel for the Township (Tr. at 37-38). Counsel now dispute whether the stipulation was merely that antennas are a permitted use in the area zoned as Light Industrial or whether the stipulation was that this is the only area where the antennas are a permitted use. Regardless of the stipulation, there was no evidence presented which indicated that the use was permitted under the ordinance anywhere else within the township.

holding the key to the company's being able to provide service to its customers. This is likely not what was envisioned when the Telecommunications Act was enacted.

*4 The Township claims that in addition to the SAP America property, the antennas are also permitted within a Special Use district (Ex. Mfindings at 4). There was no testimony indicating that the antennas were permissible within the Special Use districts and no testimony regarding what property was located within these districts. Although it is not part of the written record, during oral argument on these motions, counsel for the Township indicated that the KISS 100 Tower, where several other companies including Comcast have placed antennas, is located within the special use district. However, counsel also indicated that the KISS 100 Tower was built prior to the Township's current zoning and they have allowed KISS to negotiate leases with whomever they choose, without requiring permits.

While other companies have erected antennas within the Township, it is not because the use was permitted by the ordinance. It is because the Township has allowed them to place the antennas in areas that are already not in compliance with the current zoning. There is no evidence that any of the other companies actually applied to the Zoning Board for permits or variances. Rather, they negotiated leases with KISS 100, who was essentially grand-fathered in that area and with the utility company, which is exempt from such zoning requirements. The fact that the Township has looked the other way in the placement of these antennas does not alleviate the fact that according to its ordinance, the use is not permitted.

In addition, in this case there was testimony that an antenna on the KISS tower would lessen the gap, but would

not provide full coverage for plaintiff (Tr. at 86, 98, 100). There was additional testimony regarding the possible use of repeaters to fill the remaining gap (Tr. at 460-63). However, there is no evidence regarding where the repeaters could be placed and whether their installation would be permitted under the ordinance.

It does not appear that the Township's zoning ordinance allows for placement of antennas necessary for the provision of wireless service anywhere, except possibly for the area zoned as Light Industrial. The Light Industrial area is not an option in this case because it is possessed by a single owner who has indicated he is unwilling to negotiate a lease with plaintiff (Tr. at 345-46, App. 23). While the Township is not responsible simply because the plaintiff is unable to negotiate a lease, a company should not be forced to negotiate with a single owner of property, giving the owner the ability to preclude the company's business operation if it so chooses. By allowing the antennas to be placed only within this area, the ordinance has the effect of prohibiting the placement of the antennas necessary for plaintiff to provide continuous service to its customers. Plaintiff is therefore precluded from placing the antennas that it needs to provide coverage anywhere within the Township.

The Township's current ordinance has the effect of prohibiting the provision of personal wireless services, in violation of the Telecommunications Act. Presumably, the ordinance was adopted prior to the need to make provisions for wireless communications systems. The Township has the right to regulate the placement of the antennas, but the regulation must comply with the limits provided by the Act. 47 U.S.C. § 322(c)(7)(B). Rather than simply choosing to look the other way when the placement of the antennas suits

its needs, the Township must make the installation of personal wireless communication services equipment a permissible use under its ordinance.[18]

*5 Despite the fact that the antennas are not permitted anywhere in the Township, plaintiff applied for a permit to install the antennas in a location where they would not have a significant impact. In order to fill the gap in coverage without the use of repeaters, the antennas must be located within a limited geographical location. Plaintiff first looked to install the antennas in a location where it might be permitted under the ordinance and when that was not available chose the rooftop of an existing tall structure within this location, rather than applying to build a new tower (Tr. at 333-34). By denying the permit for plaintiff to install the antennas in the location they proposed in order to cure this violation, the Township violated the Telecommunications Act. Plaintiff must now be permitted to install its antennas in the proposed location. See Adams Outdoor Advertising, Ltd. v. Borough of Coopersburg Zoning Hearing Bd., 625 A.2d 768, 770 (Pa. Commw.1993) (stating that where a legitimate use is excluded by a zoning ordinance the appropriate remedy is to grant the requested application provided "submitted plans are not injurious to public health, safety,

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[18] Under the current ordinance, not only is the use not permitted in a location that would enable plaintiff to install its antennas, but it is questionable whether it is permitted anywhere within the Township. Counsel for the Township stipulated at the hearing that the antennas would be permitted in the area zoned as light industrial. However, under the ordinance even this is questionable. The light industrial zone allows for "microwave towers", which are not truly the same as the towers necessary for telecommunications facilities. The height limitations for this area, contained in § 172-105, are also questionable. Plaintiff argues that although it permits towers on existing buildings to exceed the height limitation, it would not apply to a free standing tower in that area.

welfare and morals").

Procedural Limitations:

The Board's decision was in writing, as required by the Act, but plaintiff claims the Township further violated the TCA because the decision was not supported by "substantial evidence", as required by 47 U.S.C. § 332(c)(7)(B)(iii). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Cellular Tele. Co. v. Zoning Bd. of Adjustment of the Borough of Ho-Ho-Kus, 24 F. Supp.2d 359, 365-66 (D.N.J.1998). As long as there is adequate evidence to support the Board's decision, the court must affirm the decision even if it would have decided the case differently. Id. The local zoning authority bears the burden of demonstrating its denial is supported by substantial evidence and each statement must be supported by some evidentiary basis. See Omnipoint v. Penn Forest Township, 1999 WL 181954 at *4-5 (M.D.Pa).

After reviewing the record, it is the opinion of this Court that the Board's findings and conclusions of law related to interpretation of the ordinance as to whether the antennas are an "accessory use" are supported by substantial evidence. The ordinance provides that the permitted uses in the Apartment/Office zoning district are:

"(a) apartment house building,

(b) service office building, and

(c) accessory uses on the same lot with and customarily incidental to the foregoing permitted uses. The term accessory use does not include a business but may include

a recreational use when authorized as a special exception by the Zoning Hearing Board, when using as standards and guides generally the requirements of this chapter and specifically the requirements of this article."

The ordinance clearly defines an accessory use as "a use subordinate to the main building on a lot and customarily incidental thereto" (§ 172-2). The ordinance allows service shops, a business use, within the apartment housing only "when they are designed and located to serve the occupants".

*6 The Board's conclusion that the proposed antenna is not an "accessory use" which is permitted in the A/O district seems to be supported by the ordinance itself and the record. There was no evidence presented which demonstrated that the antenna would fit this definition of an accessory use to the apartment building or to a building simply because it is a tall structure. The installation of plaintiff's antennas is not incidental to the building's use as an apartment. The occupants, who are primarily senior citizens, would not be receiving any special benefit from the installation of the antennas. The Board also correctly compared this application to AWACS' prior application to position it's antennas in the same location. AWACS had also claimed the antennas were an accessory use. This Court agrees with the Zoning Board and with the Pennsylvania Commonwealth Court that the installation of the antennas is clearly not a permitted or accessory use within this zoning district. See AWACS Inc. v. Zoning Hearing Board of Newtown Township, Delaware County, 702 A.2d 604 (Pa. Commw. 1997). Accordingly, purely from a zoning perspective, the Board's findings were supported by substantial evidence.

However, this Court finds that the Board's findings

and conclusions regarding the Telecommunication Act are not supported by "substantial evidence". The Board concluded that it is impossible to draw the conclusion that the Township Ordinance prohibits or has the effect of prohibiting the provision of wireless services because they are specifically permitted in the Light Industrial districts and in the Special Use district, where the KISS Tower is located. (Ex. M findings at 13).

First, this Court concludes that there was no evidence in the record to indicate that the use is specifically permitted in the Special Use districts or that the KISS tower is located in such a district. The evidence was simply that other companies had placed antennas on the tower (Tr. at 60-61). There is evidence that the ordinance and the denial of the building permit in this case result in a ban of continuous service for plaintiff. Plaintiff's expert testified that an antenna placed on the KISS Tower would lessen the gap in coverage, but would not close it even with the use of repeaters on telephone poles (Tr. at 86, 98, 100). The Township's expert, Nelson, testified that with the use of repeaters, alterations to the height and tilt of the antennas, and increases in the power, the gap could be closed (Tr. at 460-63). However, he admittedly had not performed a propagation study or conducted a drive test of the site (Tr. at 494-95). In response, plaintiff's senior radio frequency engineer, Zarei, testified that raising the height of the antennas and changing the tilt is not a feasible alternative because it would cause interference in the rest of the network (Tr. at 530-34). There was also no testimony that repeaters would actually be permitted to be placed on telephone poles,

as suggested by the Township.[19] The utility companies are exempt from zoning requirements, but plaintiff is not. See AWACS Inc. v. Zoning Hearing Bd. of Newtown Township, supra. Most significantly, there was no evidence presented that under the ordinance the antennas would be a permitted use on the KISS Tower.

*7 The Board stipulated that the antennas would be permitted in the Light Industrial District. The record also supports that the sight known as SAP America might be a suitable location for plaintiff's antennas (Tr. at 243). However, due to the fact that the single owner of this district is unwilling to negotiate, the site was not investigated further. In its findings, the Board stated that there is no requirement that forces one landowner to contract with a prospective user of land for the purposes for which the prospective user wishes to make of the land. The Board also states that "neither the Township nor the State has the authority to force a private owner of land to make their land available for anyone's use not to do so except through the doctrine of eminent domain" (Ex. Mfindings at 14-15). While this may be true, the fact that the Township has only one available district where the antennas would be permitted, that would actually fill plaintiff's gap in coverage and that the entire district is owned by a single owner, does not seem to be sufficient to satisfy the Act. While the Township cannot be held responsible if all parties are unwilling to negotiate with parties in plaintiff's situation, it must at least provide a reasonable opportunity for negotiations. The Board's findings in this case result in a ban of plaintiff's coverage, in violation of the TCA. The Board's findings and

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[19] The Chairman stated on the record at the time of Parsia's cross-examination that it had not been established whether repeaters would be a permitted use or not (Tr. at 101).

conclusions relating to whether there was a violation of the TCA are not supported by substantial evidence.

CIVIL RIGHTS ACT

Plaintiff claims the Township and the Zoning Board acted under the color of state law when they violated the Telecommunications Act and request attorney's fees under the Civil Rights Act, 42 U.S.C. § 1983. The Civil Rights Act states:

> "Every person, who under color of any statute, ordinance, regulation, custom, usage of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

42 U.S.C. § 1983.

In order to demonstrate a violation of § 1983, the plaintiff must demonstrate not only the violation of the TCA, but also that such a violation can be redressed through the Civil Rights Act. Two requirements must be met in order for a cause of action under § 1983 to exist from a violation of a federal statute. West Virginia University Hospital, Inc. v. Casey, 885 F.2d 11 (3d Cir. 1989) (citing, Penhurst State School and Hospital v. Halderman, 451 U.S. 1 (1981)). First, the plaintiff must allege a violation of a federal right, not merely a federal law. Blessing v. Freestone, 520 U.S. 329 (1997). Second, the federal law must not reflect congressional intent to foreclose private enforcement. Id.

*8 The Court in Blessing listed three factors to determine whether a statutory provision creates a privately enforceable right: (1) whether the plaintiff is the intended beneficiary of the statute; (2) whether the plaintiff's asserted interests are not so vague and amorphous as to be beyond the competence of the judiciary to enforce; and (3) whether the statute imposes a binding obligation on the State. Id. (citing Wilder v. Virginia Hospital Ass'n, 496 U.S. 498, 509 (1990)). If plaintiff demonstrates such a right, there is a rebuttable presumption that it is enforceable under § 1983. Id. However, the right is not enforceable under § 1983 if Congress has either specifically foreclosed a § 1983 remedy or impliedly foreclosed such a remedy by creating a comprehensive enforcement scheme that is incompatible with individual § 1983 enforcement. Id. (citing Smith v. Robinson, 468 U.S. 992 (1984), Livadas v. Bradshaw, 512 U.S. 107, 133 (1994)).

The TCA imposes requirements on state and local authorities in order to facilitate the construction of personal wireless communication facilities. The Act was clearly intended to benefit entities such as the plaintiff, Omnipoint, thus satisfying the first requirement. See Omnipoint Communications v. Zoning Hearing Board of Chadds Ford, 1998 WL 764762, *5 (E.D.Pa.). The Act also gives the courts the power of judicial review of the decisions made by local zoning authorities. It specifically provides that the court should hear and decide such an action on an expedited basis. 47 U.S.C. § 332(c)(7)(B)(v). The fact that the Act specifically allows for such judicial review demonstrates that the Act is not so vague that it can not be judicially enforced. See Chadds Ford, supra. Therefore, the second requirement is also satisfied. Id. In order to satisfy the third requirement, the provision of the statute giving rise to the alleged right must be phrased in mandatory rather than precatory terms.

Blessing, supra. The TCA imposes a binding obligation upon the States, which can be redressed in federal court. The Act places clear mandatory limitations upon the State and local authorities, thus also satisfying this third requirement. See 47 U.S.C. (c)(7)(B). Therefore, under this test, the TCA provides a privately enforceable right.

The next question is whether Congress has either specifically or impliedly foreclosed a § 1983 remedy. The TCA clearly does not contain language which specifically forecloses a remedy under the Civil Rights Act. The only remaining issue is whether the TCA contains a remedial scheme, which is sufficiently comprehensive to infer Congressional intent to foreclose a § 1983 remedy. The Supreme Court has inferred such intent only twice, in Middlesex County Sewage Authority v. Sea Clammers, 453 U.S. 1 (1981) and in Smith v. Robinson, 468 U.S. 992 (1984). Blessing, supra.

In Sea Clammers, 453 U.S. 1 (1981), the plaintiff attempted to maintain a § 1983 claim for violations of the Federal Water Pollution Control Act ("FWPCA") and the Marine Protection, Research, and Sanctuaries Act of 1972 ("MPRSA"). The Court held that when enacting the FWPCA and MPRSA, Congress intended to supplant any remedies that would otherwise be available under § 1983. Id. at 20. The FWPCA prohibits the discharge of certain levels of waste without a valid permit and the MPRSA requires permits before dumping waste into coastal waters. Id. at 11-12. The Court found the enforcement mechanism of both statutes to be comprehensive because of their specific statutory remedies, including citizen suit provisions. Id. at 20.

*9 In Smith v. Robinson, 468 U.S. 992 (1984), the

Court considered whether Congress intended to foreclose a § 1983 remedy when enacting the Education for All Handicapped Children Act ("EHA"). The Court held that the EHA is a comprehensive scheme. Id. at 1009. The Court determined that Congress intended that the EHA be available for handicapped children to pursue their claims to a publicly financed special education through the "carefully tailored administrative and judicial mechanism set out in the statute." Id. Given the procedures set forth in the statute, including a process beginning on a local level, parental safeguards, and a right to judicial review, the Court concluded that Congress did not intend for a § 1983 remedy to be available to enforce the Act.[20] Id. at 1010-11.

In cases where the Court has not found statutes to be so comprehensive as to foreclose a remedy under § 1983, it has been because the enforcement scheme included within the statutes was more limited. In Blessing, the Court noted that in contrast to the statutes in Sea Clammers and Smith, the statute in question did not contain a "private remedy--either judicial or administrative--through which aggrieved persons can seek redress." Blessing, supra. In Wright v. City of Roanoke Redevelopment & Housing Authority, 479 U.S. 418 (1987), the Court also noted that the statute in question did not provide for a judicial remedy, evidencing Congressional intent to foreclose a § 1983 remedy. Id. at 427.

The Third Circuit has not ruled on whether the TCA provides a comprehensive enforcement mechanism, which

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[20] After the Court's ruling that a § 1983 remedy was not intended to be available to enforce the Act, Congress amended the EHA to allow for attorney's fees. See Fontenot v. Louisiana Bd. of Elementary and Secondary Education, 805 F.2d 1222 (5th Cir. 1986).

forecloses a § 1983 remedy. However, there are two district court cases dealing with this precise issue. See Omnipoint v. Penn Forest Township, 1999 WL 181954 (M.D. Pa); Omnipoint v. Zoning Bd. of Chadds Ford Township, 1998 WL 764762 (E.D. Pa.). In both cases, the courts examined the opinion of the Massachusetts district court in National Telecommunication Advisors v. City of Chicopee, 16 F. Supp 2d 117 (D. Mass. 1998), in which the district court found the TCA foreclosed a § 1983 remedy.

The Court in Chadds Ford, concluded that the TCA does not provide a remedial scheme sufficient to preclude a § 1983 remedy. The court disagreed with National Telecommunication Advisors, stating that taken to its limit, the court's reading of the cases "suggests that any remedial scheme that provides a mechanism for judicial relief would render the scheme sufficiently comprehensive to infer Congressional intent to foreclose reliance on § 1983." Chadds Ford, supra at *9. The court in Chadds Ford, determined that the enforcement mechanism of the TCA is not as elaborate as those in Sea Clammers and Robbins and concluded that judicial deference is in conformity with the Third Circuit's interpretation of the Sea Clammers' doctrine in Johnson v. Orr, 780 F.2d 386 (3d Cir. 1986). Chadds Ford, supra at *9-10.

***10** In contrast, the court in Penn Forest found that "[j]udicial review was precisely the remedial factor emphasized in Smith, Sea Clammers, Wright and Blessing " and concluded that the TCA, which provides for expedited federal judicial review, is comprehensive. Penn Forest, supra at *9. The court stated that although the enforcement mechanism is not elaborate, "the simplicity of its remedial scheme does not preclude a determination that it is comprehensive." Id. at *11.

After careful consideration, this Court is of the opinion that the TCA contains a remedial scheme which is sufficiently comprehensive to infer Congressional intent to foreclose a § 1983 remedy. The Telecommunications Act clearly directs a remedy for private parties. Litigants may seek direct relief in district court, without any exhaustion requirement and their hearing must be expedited. 47 U.S.C. § 332(C)(7)(B)(v).

The only purpose that a suit under § 1983 serves in a case such as this is that it enables recovery of attorney's fees. I agree with the courts in National Telecommunications Advisors and Penn Forest that the addition of a Civil Rights Count merely for the recovery of attorneys fees seems to undermine the importance of § 1983 and its intended purpose.

> "The comprehensiveness of the TCA's remedial scheme is perhaps best evidenced by the fact that the § 1983 statutory apparatus adds nothing to plaintiff's remedial armament under the TCA--except the opportunity to seek attorney's fees under § 1988. In other words, plaintiff has tacked Count III onto its complaint merely for fees. While the desire to recoup fees is understandable, the use of § 1983 in such a way trivializes this important statute and is inconsistent with its intent."

Omnipoint Communications, Inc. v. Penn Forest Township, 1999 WL 181954 (M.D.Pa.) (quoting National Telecommunication Advisors, Inc. v. City of Chicopee, 16 F. Supp.2d 117, 122 (D. Mass. 1998)).

The TCA mandates a private cause of action and expedited review. The addition of a Civil Rights Claim does

not provide an additional enforcement mechanism for a violation of the Act. The Act provides a comprehensive mechanism for enforcement, but notably does not contain a provision allowing for attorney's fees. The allowance of fees in cases dealing with violations of the TCA would result in fees being ultimately borne by the taxpayers of the respective townships. To allow the addition of a § 1983 claim merely for the allowance of fees, not only violates the intent of the Civil Rights Act, but also unfairly places a burden on the taxpayers of localities that in good faith defend claims under the TCA. For these reasons, this Court concludes that by specifically setting forth the available remedies for enforcement Congress intended to foreclose the availability of a § 1983 claim to enforce violations of the TCA. Accordingly, defendant's motion for summary judgment as to this claim is granted and plaintiff's claim for fees is denied.

STATE LAW CLAIM

*11 Finally, plaintiff alleges that defendant has violated Pennsylvania zoning law. Under State law a court will reverse the decision of a zoning board when the board has committed an abuse of discretion or an error of law. Hertzberg v. Zoning Bd. of Adjustment, 721 A.2d 43, 46 (Pa. 1998) (citing Larsen v. Zoning Bd. of Adjustment, 543 Pa. 415, 419 (1996). In order to determine whether the board has abused its discretion, the court must determine whether the decision is supported by substantial evidence. Id. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion". Id. (citing Valley View Civic Ass'n v. Zoning Bd. of Adjustment, 501 Pa. 550, 555 (1983)).

As discussed above, the defendant's findings

regarding the Telecommunications Act are not supported by substantial evidence. The Board's findings must therefore be reversed.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

OMNIPOINT COMMUNICATIONS ENTERPRISES, L.P., Plaintiff	:	CIVIL ACTION
vs.	:	
NEWTOWN TOWNSHIP, and ZONING HEARING BOARD OF NEWTOWN TOWNSHIP	:	
Defendants	:	NO. 98-5171

ORDER

AND NOW, to wit, this 29th day of April, 1999, after this Court's findings of April 21st, 1999, that:

1. Plaintiff's Motion for Summary Judgment is GRANTED; and

2. Defendants' Motion for Summary Judgment is DENIED, It is further ORDERED that:

3. Pursuant to this Court's authority under 47 U.S.C. § 332(c)(7)(B)(v):

(a) The application submitted by Omnipoint to the Zoning Board is hereby GRANTED;

(b) Newtown Township shall take all steps necessary to allow for the proposed installation within 10 days from the

date of this Order; and

4. Plaintiff's claim for attorney's fees under The Civil Rights Act is DENIED.

It is so ORDERED.

BY THE COURT:

s/_____

CHARLES B. SMITH
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

OMNIPOINT COMMUNICATIONS ENTERPRISES, L.P., Plaintiff	:	CIVIL ACTION
vs.	:	FILED: June 2, 1999
NEWTOWN TOWNSHIP, and ZONING HEARING BOARD OF NEWTOWN TOWNSHIP Defendants	:	NO. 98-5171

MEMORANDUM AND ORDER

CHARLES B. SMITH
UNITED STATES MAGISTRATE JUDGE

BACKGROUND

*1 Presently before the Court is plaintiff's Motion for Relief Under Rule 60(b)(6). This Court issued a Memorandum and Order on April 29, 1999, granting Plaintiff Omnipoint's Motion For Summary Judgment against Newtown Township for claims dealing with the Telecommunications Act (TCA), but denying plaintiff's claim for attorney's fees filed under the Civil Rights Act. On May 18, 1999, plaintiff filed the instant motion seeking to have that portion of the order dealing with the Civil Rights Act amended. For the reasons that follow, the motion is denied.

DISCUSSION

Rule 60(b) states that "on motion and upon terms that are just, the court may relieve a party or a party's legal representative from a final judgment, order or proceeding" for one of the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence; (3) fraud, misrepresentation or misconduct; (4) the judgment is void; (5) the judgment has been satisfied or released; or (6) "any other reason justifying relief from the operation of the judgment". Fed.R.Civ.P. 60(b). Plaintiff in this case has filed the current motion under Rule 60(b)(6). Plaintiff argues that this court's ruling that the Telecommunications Act precludes a claim for attorney fees under the Civil Rights Act is "inconsistent with controlling precedent of the United States Court of Appeals for the Third Circuit which was not previously considered" and asks that the Court "correct a plain error of law" (motion at 1-2).

Plaintiff cites a third circuit case, W.B. v. Matula, 67 F.3d 484 (3d Cir. 1995), in which the court considered whether the Individuals with Disabilities Education Act ("IDEA"), formerly known as the Education of the Handicapped Act ("EHA"), precluded a § 1983 action for a violation of the Act. The court held that although the statute contained an elaborate scheme and allowed for access to federal court, a § 1983 action was not precluded, but was preserved by the savings clause contained in the statute. The statute states "nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, title V of the Rehabilitation Act of 1973, or other Federal statutes ..." 20 U.S.C. 1415(f). This provision was added by Congress after the Supreme Court in Smith v. Robbinson, held in 1984 that the EHA precluded

additional remedies. The savings clause was added by Congress for the express purpose of overruling Smith and to allow for additional remedies under § 1983 and § 504.

This is entirely different than the present case. In Matula, there was little question of Congress' intent. The Supreme Court had already dealt with the statute in question and Congress had responded by adding the savings clause. In contrast, the present case deals with the Telecommunications Act, which the Supreme Court has not yet addressed and to which Congress has not so clearly spoken.[21] Therefore, this case is of little help in our analysis.

*2 Plaintiff has brought to the court's attention, a case decided by Judge Bechtle just prior to the decision issued in this case, of which this court was previously unaware. In Cellco Partnership v. Hess, 1999 WL 178364 (E.D. March 30, 1999), Judge Bechtle found that the Telecommunications Act's remedial scheme is not so comprehensive as to imply that Congress intended to foreclose section 1983 remedies. Judge Bechtle agreed with Judge Padova's opinion in Omnipoint v. Zoning Hearing Board of Chadds Ford Township, 1998 WL 764762 (E.D. Pa.), in which Judge Padova disagreed with the court in National Telecommunication Advisors v. City of Chicopee, 16 F. Supp.2d. 117 (D. Mass. 1998). However, since I

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[21] The savings clause in the TCA states "[n]othing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." 47 U.S.C. § 414. It is worth noting that this clause has not been cited by the courts addressing this issue. The clause cannot be said to as clearly express Congress' intent on this issue as the clause in Matula, which mentions specific statutes and was added in response to the Supreme Court's ruling.

considered Judge Padova's reasoning in my previous memorandum and Judge Bechtle simply followed that reasoning, the opinion does not alter my decision.

Notwithstanding that now two of my district court colleagues have chosen a different view, my opinion remains that the Telecommunications Act contains a remedial scheme that while not elaborate, is sufficiently comprehensive to infer Congressional intent to foreclose a section 1983 remedy. As stated by the court in Omnipoint v. Penn Forest Township, 1999 WL 181954 (M.D. Pa.), "judicial review was precisely the remedial factor emphasized in Smith, Sea Clammers, Wright, and Blessing." Penn Forest at *9. The Telecommunications Act, does not only allow for federal judicial review, but it specifically states that private parties may seek direct relief in district court, without prior exhaustion, and that such a case must be heard on an expedited basis. 47 U.S.C. § 332(c)(7)(B)(v).

As I previously stated, the only purpose a claim under § 1983 would serve in an action based upon a violation of the Telecommunication Act is to allow for the award of attorney's fees under § 1988. The fact that no additional remedy other than the recovery of fees is added by a claim under the Civil Rights Act is further evidence of the Act's comprehensiveness. As the courts in National Telecommunication Advisors v. City of Chicopee and Omnipoint v. Penn Forest reasoned, the use of the Civil Rights Act for the sole purpose of obtaining attorney's fees appears to trivialize and undermine the importance of the Civil Rights Act. See National Telecommunication Advisors, supra. at 122-123; Penn Forest, supra. at *13. It seems clear that Congress' intent when enacting the Civil Rights Act was not for it to be tacked onto other causes of action for the sole purpose of recovering fees. The intent of the fee provision in

the Civil Rights Act was to award fees to individual victims who have been wronged by Constitutional violations, not to force taxpayers to pay fees to large corporations in cases brought for violations under the TCA. The addition of this claim also does not serve any purpose intended by the enactment of the TCA.

In addition, my perspective coming out of the Pennsylvania system is different than that of my district court colleagues. The Supreme Court of Pennsylvania has always held and most recently unanimously reaffirmed in Merlino v. Delaware County, 1999 WL 262290 (Pa. May 3, 1999), that attorneys fees are typically not awarded unless the allowance of fees is specifically permitted by the statute violated. Merlino at *2. The use of the Civil Rights Act for the sole purpose of granting attorney's fees undermines the intent of the Civil Rights Act as well as the general principle regarding fee shifting. The allowance of fees in cases brought under the Telecommunications Act also unfairly places an additional burden on the local entities litigating under the Act, which will ultimately be borne by the taxpayers. "Given that litigation under the TCA will inevitably be directed, from time to time, at relatively unsophisticated, small or remote townships, the absence of any provision for fees in the TCA is telling." National Telecommunication Advisors Inc., supra. at 121.

*3 In conclusion, mindful of my colleagues' opinions, I respectfully disagree and maintain agreement with at least one other district court in the circuit and with the district court of Massachusetts, that a § 1983 remedy for a violation of the Telecommunications Act has been impliedly foreclosed. See Omnipoint v. Penn Forest Township, 1999 WL 181954 (M.D. Pa.); National Telecommunication Advisors, Inc. v. City of Chicopee, 16 F.

Supp.2d 117 (D. Mass. 1998). My reasoning for denying the claim under the Civil Right Act remains. The Telecommunications Act allows for a private cause of action, allowing citizens to take direct action in district court and to do so on an expedited basis. The Act's enforcement scheme is not elaborate, but is comprehensive enough to imply that Congress intended to foreclose action under § 1983. As stated by defendant in its response to this motion, there is currently a split in this circuit which should properly be addressed by filing an appeal rather than a motion under Rule 60(b)(6). Therefore the motion is denied.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

OMNIPOINT COMMUNICATIONS ENTERPRISES, L.P., Plaintiff	:	CIVIL ACTION
vs.	:	
NEWTOWN TOWNSHIP, and ZONING HEARING BOARD OF NEWTOWN TOWNSHIP Defendants	:	NO. 98-5171

ORDER

AND NOW, to wit, this 1st day of JUNE, 1999, upon consideration of plaintiff's Motion for Relief Under Rule 60(b) and defendant's response thereto, it is hereby ORDERED that plaintiff's Motion is DENIED.

BY THE COURT:

s/_____

CHARLES B. SMITH
UNITED STATES MAGISTRATE JUDGE

TELECOMMUNICATIONS ACT

§ 332. Mobile services

(a) Factors which Commission must consider

In taking actions to manage the spectrum to be made available for use by the private mobile services, the Commission shall consider, consistent with section 151 of this title, whether such actions will--

(1) promote the safety of life and property;

(2) improve the efficiency of spectrum use and reduce the regulatory burden upon spectrum users, based upon sound engineering principles, user operational requirements, and market-place demands;

(3) encourage competition and provide services to the largest feasible number of users; or

(4) increase interservice sharing opportunities between private mobile services and other services.

(b) Advisory coordinating committees

(1) The Commission, in coordinating the assignment of frequencies to stations in the private mobile services and in the fixed services (as defined by the Commission by rule), shall have authority to utilize assistance furnished by advisory coordinating committees consisting of individuals who are not officers or employees of the Federal Government.

(2) The authority of the Commission established

in this subsection shall not be subject to or affected by the provisions of part III of Title 5 or section 1342 of Title 31.

(3) Any person who provides assistance to the Commission under this subsection shall not be considered, by reason of having provided such assistance, a Federal employee.

(4) Any advisory coordinating committee which furnishes assistance to the Commission under this subsection shall not be subject to the provisions of the Federal Advisory Committee Act.

(c) Regulatory treatment of mobile services

(1) Common carrier treatment of commercial mobile services

(A) A person engaged in the provision of a service that is a commercial mobile service shall, insofar as such person is so engaged, be treated as a common carrier for purposes of this chapter, except for such provisions of subchapter II of this chapter as the Commission may specify by regulation as inapplicable to that service or person. In prescribing or amending any such regulation, the Commission may not specify any provision of section 201, 202, or 208 of this title, and may specify any other provision only if the Commission determines that--

(i) enforcement of such provision is not necessary in order to ensure that the charges, practices, classifications, or regulations for or in connection with that service are just and reasonable and are not unjustly or unreasonably discriminatory;

(ii) enforcement of such provision is not necessary for the protection of consumers; and

(iii) specifying such provision is consistent with the public interest.

(B) Upon reasonable request of any person providing commercial mobile service, the Commission shall order a common carrier to establish physical connections with such service pursuant to the provisions of section 201 of this title. Except to the extent that the Commission is required to respond to such a request, this subparagraph shall not be construed as a limitation or expansion of the Commission's authority to order interconnection pursuant to this chapter.

(C) The Commission shall review competitive market conditions with respect to commercial mobile services and shall include in its annual report an analysis of those conditions. Such analysis shall include an identification of the number of competitors in various commercial mobile services, an analysis of whether or not there is effective competition, an analysis of whether any of such competitors have a dominant share of the market for such services, and a statement of whether additional providers or classes of providers in those services would be likely to enhance competition. As a part of making a determination with respect to the public interest under subparagraph (A)(iii), the Commission shall consider whether the proposed regulation (or amendment thereof) will promote competitive market conditions, including the extent to which such regulation (or amendment) will enhance competition among providers of commercial mobile services. If the Commission determines that such regulation (or amendment) will promote competition among providers of

commercial mobile services, such determination may be the basis for a Commission finding that such regulation (or amendment) is in the public interest.

(D) The Commission shall, not later than 180 days after August 10, 1993, complete a rulemaking required to implement this paragraph with respect to the licensing of personal communications services, including making any determinations required by subparagraph (C).

(2) Non-common carrier treatment of private mobile services

A person engaged in the provision of a service that is a private mobile service shall not, insofar as such person is so engaged, be treated as a common carrier for any purpose under this chapter. A common carrier (other than a person that was treated as a provider of a private land mobile service prior to the enactment of the Omnibus Budget Reconciliation Act of 1993) shall not provide any dispatch service on any frequency allocated for common carrier service, except to the extent such dispatch service is provided on stations licensed in the domestic public land mobile radio service before January 1, 1982. The Commission may by regulation terminate, in whole or in part, the prohibition contained in the preceding sentence if the Commission determines that such termination will serve the public interest.

(3) State preemption

(A) Notwithstanding sections 152(b) and 221(b) of this title, no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile

service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services. Nothing in this subparagraph shall exempt providers of commercial mobile services (where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such State) from requirements imposed by a State commission on all providers of telecommunications services necessary to ensure the universal availability of telecommunications service at affordable rates. Notwithstanding the first sentence of this subparagraph, a State may petition the Commission for authority to regulate the rates for any commercial mobile service and the Commission shall grant such petition if such State demonstrates that--

(i) market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory; or

(ii) such market conditions exist and such service is a replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within such State.

The Commission shall provide reasonable opportunity for public comment in response to such petition, and shall, within 9 months after the date of its submission, grant or deny such petition. If the Commission grants such petition, the Commission shall authorize the State to exercise under State law such authority over rates, for such periods of time, as the Commission deems necessary to ensure that such rates are just and reasonable and not unjustly or unreasonably discriminatory.

(B) If a State has in effect on June 1, 1993, any regulation concerning the rates for any commercial mobile service offered in such State on such date, such State may, no later than 1 year after August 10, 1993, petition the Commission requesting that the State be authorized to continue exercising authority over such rates. If a State files such a petition, the State's existing regulation shall, notwithstanding subparagraph (A), remain in effect until the Commission completes all action (including any reconsideration) on such petition. The Commission shall review such petition in accordance with the procedures established in such subparagraph, shall complete all action (including any reconsideration) within 12 months after such petition is filed, and shall grant such petition if the State satisfies the showing required under subparagraph (A)(i) or (A)(ii). If the Commission grants such petition, the Commission shall authorize the State to exercise under State law such authority over rates, for such period of time, as the Commission deems necessary to ensure that such rates are just and reasonable and not unjustly or unreasonably discriminatory. After a reasonable period of time, as determined by the Commission, has elapsed from the issuance of an order under subparagraph (A) or this subparagraph, any interested party may petition the Commission for an order that the exercise of authority by a State pursuant to such subparagraph is no longer necessary to ensure that the rates for commercial mobile services are just and reasonable and not unjustly or unreasonably discriminatory. The Commission shall provide reasonable opportunity for public comment in response to such petition, and shall, within 9 months after the date of its submission, grant or deny such petition in whole or in part.

(4) Regulatory treatment of communications

satellite corporation

Nothing in this subsection shall be construed to alter or affect the regulatory treatment required by title IV of the Communications Satellite Act of 1962 [47 U.S.C.A. § 741 et seq.] of the corporation authorized by title III of such Act [47 U.S.C.A. § 731 et seq.].

(5) Space segment capacity

Nothing in this section shall prohibit the Commission from continuing to determine whether the provision of space segment capacity by satellite systems to providers of commercial mobile services shall be treated as common carriage.

(6) Foreign ownership

The Commission, upon a petition for waiver filed within 6 months after August 10, 1993, may waive the application of section 310(b) of this title to any foreign ownership that lawfully existed before May 24, 1993, of any provider of a private land mobile service that will be treated as a common carrier as a result of the enactment of the Omnibus Budget Reconciliation Act of 1993, but only upon the following conditions:

(A) The extent of foreign ownership interest shall not be increased above the extent which existed on May 24, 1993.

(B) Such waiver shall not permit the subsequent transfer of ownership to any other person in violation of section 310(b) of this title.

(7) Preservation of local zoning authority

(A) General authority

Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.

(B) Limitations

(i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof--

(I) shall not unreasonably discriminate among providers of functionally equivalent services; and

(II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

(ii) A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request.

(iii) Any decision by a State or local government or instrumentality thereof to deny a request

to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.

(iv) No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.

(v) Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis. Any person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commission for relief.

(C) Definitions

For purposes of this paragraph--

(i) the term "personal wireless services" means commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services;

(ii) the term "personal wireless service facilities" means facilities for the provision of

personal wireless services; and

(iii) the term "unlicensed wireless service" means the offering of telecommunications services using duly authorized devices which do not require individual licenses, but does not mean the provision of direct-to- home satellite services (as defined in section 303(v) of this title).

(8) Mobile services access

A person engaged in the provision of commercial mobile services, insofar as such person is so engaged, shall not be required to provide equal access to common carriers for the provision of telephone toll services. If the Commission determines that subscribers to such services are denied access to the provider of telephone toll services of the subscribers' choice, and that such denial is contrary to the public interest, convenience, and necessity, then the Commission shall prescribe regulations to afford subscribers unblocked access to the provider of telephone toll services of the subscribers' choice through the use of a carrier identification code assigned to such provider or other mechanism. The requirements for unblocking shall not apply to mobile satellite services unless the Commission finds it to be in the public interest to apply such requirements to such services.

(d) Definitions

For purposes of this section--

(1) the term "commercial mobile service" means any mobile service (as defined in section 153 of this title) that is provided for profit and makes interconnected service

available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public, as specified by regulation by the Commission;

(2) the term "interconnected service" means service that is interconnected with the public switched network (as such terms are defined by regulation by the Commission) or service for which a request for interconnection is pending pursuant to subsection (c)(1)(B) of this section; and

(3) the term "private mobile service" means any mobile service (as defined in section 153 of this title) that is not a commercial mobile service or the functional equivalent of a commercial mobile service, as specified by regulation by the Commission.

CIVIL RIGHTS ACT

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C.A. § 1983

ZONING ORDINANCE

§ 172-1. Word usage.

The present tense includes the future; the singular number includes the plural and the plural the singular. The word "building" includes the word "structure" and shall be construed as if followed by the words "or part thereof." The word "occupy" includes the words "designed or intended to be occupied." The word "use" includes the words "arranged, designed or intended to be used." The word "shall" is always mandatory.

§ 172-2. Definitions.

A. Unless otherwise expressly stated, the following words and phrases shall be construed throughout this chapter to have the meanings indicated in this Article:

ACCESSORY BUILDING —— A structure subordinate to the main building on a lot and used for purposes customarily incidental to those of the main building.

ACCESSORY USE —— A use subordinate to the main use of the land or of a building on a lot and customarily incidental thereto.

APARTMENT —— A room or group of rooms in an apartment house designated for and occupied exclusively as a residence for only one (1) family.

APARTMENT HOUSE BUILDING —— A building designated for and occupied exclusively as a residence for three (3) or more families living independently of one another and which building is a single building unit

for purpose of operation, management and maintenance, and/or a group of one (1) or more townhouses or row houses. **[Amended 10-11-1976 by Ord. No. 1976-4]**

BASEMENT — A space of full story height, wholly or partly below exterior grade, which is not used for living accommodations other than for janitor's quarters.

BOARDINGHOUSE or ROOMING HOUSE — A house in which more than three (3) people are sheltered or fed for profit.

BUILDING — Any structure, including main or accessory building.

(1)DETACHED BUILDING — A building which has no party wall.

(2)SEMIDETACHED BUILDING — A building which has only one (1) party wall.

BUILDING AREA — The aggregate of the maximum horizontal cross-section area of all buildings on a lot, excluding cornices, eaves, gutters, steps, chimneys, balconies, unroofed terraces and unroofed porches.

BUILDING HEIGHT — The vertical measurement of a building from the mean or average level of the ground abutting the building to the highest point of the main roof, provided that chimneys, spires, towers, elevator penthouses, tanks and similar projections of the building shall not be included in calculating the height.

§ 172-81. Applicability.

In I Light Industrial Districts, the regulations contained in this Article shall apply.

§ 172-82. Permitted uses.

A building may be erected or used and a lot may be used or occupied for any of the following purposes and no others:

A. Offices for administrative, executive, professional sales and other similar uses.

B. Manufacturing, fabricating, assembling, packaging, and/or processing of the following: scientific and precision instruments and controls, electronic components, computers, pharmaceutical and optical goods, metalized and coated plastic film, photographic reproduction, film and equipment, jewelry and timepieces, candy, cosmetics, dairy products, drugs and perfume.

C. Cinema, radio and television productions.

D. newspaper, job printing or bookbinding establishment.

E. Distribution plants, parcel delivery, cold storage plants and bottling plants.

F. Electric transforming substations, microwave towers or other similar service uses. **[Amended 11-25-1996 by Ord. NO. 1996-4]**

G. Laboratories, experimental manufacturing and research.

H. Accessory uses incidental to any of the above-permitted uses, not detrimental to the neighborhood, including a cafeteria and other similar services operated by or for the employer for the exclusive use of its employees and business visitors.

I. Public or commercial parking.

J. Uses approved by the Board of Supervisors of the same general character as any of the above.

K. **[Added 1-6-1997 by Ord. No. 1997-1]** Conditional uses, subject to the provisions of §§ 172-88, 172-89 and 172-90.

§ 172-83. Area regulations.

A. Front yard, rear yard and side yards. Front, side and rear yards shall be a minimum of one hundred fifty (150) feet from any residential zoning district and fifty (50) feet from any property line or street right-of-way.

B. Lot coverage. The building area shall not exceed forty percent (40%) of the lot area, and the total of building area plus paved area shall not exceed sixty-five percent (65%) of the lot area.

C. Height regulations. No building shall exceed forty-five (45) feet in height.

D. Loading and unloading space. All buildings shall be provided with adequate off-street loading and unloading spaces located on other than the streets on which the lot abuts.

E. Parking spaces. Parking spaces shall comply with the requirements established in this Article and shall be sufficient to ensure that all parking related to the activities of the business shall be contained upon the lot.

F. Minimum lot area. The minimum lot area for any use shall be two (2) acres.

G. Buffer area. Along any part of the property line that is common with a lot in a residence district, there shall be a buffer area a minimum of fifty (50) feet side parallel with the property line; this buffer area shall be fenced from the adjoining property.

(2)

No. 00-353

Supreme Court, U.S.
FILED
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CLERK

In The

Supreme Court of the United States

OMNIPOINT COMMUNICATIONS ENTERPRISES, L.P.,

Petitioner,

v.

NEWTOWN TOWNSHIP AND THE ZONING HEARING BOARD OF NEWTOWN TOWNSHIP,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF THE QUESTION PRESENTED

Whether the preservation of local municipal zoning authority under the Telecommunications Act permits a municipality to deny a request for a building permit not in compliance with local zoning regulations when alternative sites for construction exist in compliance with applicable local zoning regulations.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 29.6

A corporate disclosure statement is not required of Respondents pursuant to Rule 29.6 for the reason that Respondent Newtown Township (Delaware County, Pennsylvania) is a governmental corporation and Respondent Zoning Hearing Board of Newtown Township is an instrumentality thereof under Pennsylvania state law.

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COUNTER-STATEMENT OF THE CASE

Petitioner Omnipoint Communications Enterprises, L.P. ("Omnipoint") is a provider of wireless telephone services. Respondent Newtown Township ("Township") is a municipality and political subdivision in Delaware County, Pennsylvania. Respondent Zoning Hearing Board of Newtown Township ("Board") is an instrumentality of the Township under applicable state law, i.e., the Pennsylvania Municipalities Planning Code, 53 P.S. § 10101 et seq. ("MPC") created under § 10901 of the MPC to perform zoning functions and render zoning adjudications set forth in the MPC.

Respondents declined to grant a building permit requested by Omnipoint to install wireless telephone antennas and related structures atop an apartment building in the Township known as the Newtown Towers located at 3400 West Chester Pike, Newtown Square, Pennsylvania. The denial was for the reason that the Township's Zoning Ordinance clearly did not permit erection of such a structure at that location.

Omnipoint filed suit in the U.S. District Court for the Eastern District of Pennsylvania alleging, inter alia, that the denial of the building permit violated the Federal Telecommunications Act of 1996, 47 U.S.C. § 332 and the Civil Rights Act, 42 U.S.C. § 1983.

The case was submitted to Magistrate Judge Smith of the District Court on cross motions for summary judgment. There were no testimonial proceedings before him. The record included the transcripts of extensive proceedings before the Board on Omnipoint's request for the

building permit. Omnipoint's motion for summary judgment was granted except for its request for attorneys' fees under the Civil Rights Act and Magistrate Judge Smith ordered the Township to permit erection of the structures. Omnipoint cross appealed to the U.S. Court of Appeals for the Third Circuit from the denial of attorneys' fees. The Township and the Board appealed from the other aspects of Magistrate Judge Smith's Orders.

The Third Circuit reversed, holding that denial of the building permit did not have the effect of prohibiting the provision of wireless services in the Township in violation of the Telecommunications Act for the reason that the record established by Omnipoint failed to demonstrate a significant gap in service available to wireless telephone service users. The Third Circuit directed a remand to complete the record. In doing so, the Third Circuit followed its recent decisions in *Cellular Tel. Co. v. Zoning Bd. of Adj. of Ho-Ho-Kus*, 197 F.3d 64 (3rd Cir. 1999) and *APT Pittsburgh Ltd. P'ship v. Penn Township*, 196 F.3d 469 (3rd Cir. 1999). Under the circumstances, the Third Circuit did not reach the Civil Rights Act claim.

From that determination, Omnipoint has now petitioned this Court for certiorari.

Due to the particularly fact-sensitive nature of the cases under the Telecommunications Act and the especially unique facts of this case, a brief review of the record available to the courts below is necessary. That record revealed the following.

On November 4, 1997, Omnipoint submitted to the Township an "application for building permit" to install

an antenna and associated electronic structures for wireless telephone service atop the roof of an apartment building located in the Township known as the Newtown Towers on West Chester Pike in the Newtown Square section of the Township. On review of the Application, the Building Inspector/Assistant Zoning Officer of the Township denied the Application for the reason that the building is located in an A-O (apartment-office) zoning district in which the requested use (i.e., erection of the antenna) is not a permitted use or accessory use in accordance with the Township's Zoning Ordinance. By letter dated November 14, 1997, Omnipoint was notified of the denial of the permit and of the availability of an appeal to the Board. The letter further advised that a zoning variance would be required to permit the structure.

Omnipoint took an appeal from the Zoning Officer's determination which was forwarded to the Township on or about December 15, 1997. No variance has ever been requested by Omnipoint. Extensive public hearings on the appeal were held before the Board on April 16, 1998, May 6, 1998, May 29, 1998, June 30, 1998 and July 16, 1998. On due consideration, the Board denied the appeal and so advised Omnipoint on August 31, 1998 by a written decision. The decision was followed by the Board's written findings of fact and conclusions of law issued on September 2, 1998.

The Newtown Towers proposed site of Omnipoint's antenna and related electronics is in a primarily residential neighborhood. The building is in the A-O zoning district, which under the zoning ordinance includes as "accessory uses" those uses which are "customarily incidental" to the permitted uses of apartment house and

service offices. Magistrate Judge Smith of the District Court below in his opinion acknowledged that the antenna was prohibited under the zoning ordinance and Omnipoint has never asserted to the contrary throughout these proceedings. Several locations within the Township other than the Newtown Towers site are available for erection of the antenna, including two light industrial zoning districts and a special use (SU2) district wherein a 500 foot tall radio tower (referred to by the parties in the proceedings of record as the "KISS 100 radio tower") is located. While the proceedings were ongoing on Omnipoint's request for a building permit, Omnipoint made a fainthearted effort to negotiate a lease at property owned by SAP America at one of these light industrial districts. The antenna would be permitted at any of these other locations under the zoning ordinance.

Ronald McHatton, the Building Inspector of the Township, conducted a test wherein he drove throughout the Township using wireless phones from several suppliers including Omnipoint and Sprint and found that he could receive and transmit clearly in all areas of the Township except to the west of Pennsylvania Route 252, a state highway which roughly bisects the Township from north to south and which intersects West Chester Pike (which runs east-west) well under a mile from the Newtown Towers site. In fact, Mr. McHatton used an Omnipoint phone in this test for about one month. The KISS 100 tower is located west of Route 252; Omnipoint's proposed site at the Newtown Towers is east of Route 252. The Township provided the testimony of an expert witness Bernard Nelson before the Zoning Hearing Board who testified as to the various means whereby alternate

sites for erection of the antenna and related electronics would provide adequate wireless service for Omnipoint without the necessity of establishing the antenna at the Newtown Towers site.

Significantly, the Newtown Towers site had previously been the subject of an application to erect an antenna by a competitor of Omnipoint, Comcast Metrophone. That permit was also denied. The denial was affirmed in proceedings appealed to the Commonwealth Court of Pennsylvania and the Supreme Court of Pennsylvania. *See AWACS, Inc. v. Zoning Hearing Board of Newtown Township*, 702 A.2d 604 (Pa. Cmwlth. Ct. 1997), *aff'd*, 559 Pa. 104, 739 A.2d 159 (1999).

In its decision, the Zoning Hearing Board had determined that Omnipoint was not entitled to the building permit inasmuch as erection of the antenna and related electronics atop the Newtown Towers did not constitute a permitted accessory use, reaffirming the decision of the Township's Building Inspector/Assistant Zoning Officer. Magistrate Judge Smith agreed in the District Court and Omnipoint has never argued to the contrary in these proceedings.

REASONS FOR DENYING THE WRIT

1. Introduction

The relevant statute is the Federal Telecommunications Act of 1996, 47 U.S.C. § 332(c)(7), which provides in relevant part as follows:

(7) Preservation of local zoning authority

(A) General authority

Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.

(B) Limitations

(i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof –

(I) shall not unreasonably discriminate among providers of functionally equivalent services; and

(II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

(ii) [Omitted]

(iii) Any decision by a State or local government or instrumentality to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.

Part (c)(7) of the statute including the anti-discrimination provision and the "effect of prohibiting" provision is itself entitled "Preservation of local zoning authority". As Magistrate Judge Smith in the District Court recognized, citing the authorities on the subject, the Telecommunications Act "clearly acknowledges the right of local governments to exercise their land use authority over personal wireless services." *See, e.g., Virginia Metronet, Inc. v. Board of Supervisors*, 984 F. Supp. 966 (E.D. Va. 1998). *Cf. Omnipoint v. Zoning Hearing Board of Pine Grove Township*, 181 F.3d 403 (3d Cir. 1999). The legislative history further makes this clear. *See* House Conf. Rep. No. 104-458, 104th Cong. 2d Sess. 208, *reprinted in* 1996 *U.S. Code Cong. & Ad. News* 222 ("The conference agreement creates a new section . . . which prevents [FCC] preemption of local and State land use decisions over zoning and land use matters except in . . . limited circumstances . . . ."). Further, Magistrate Judge Smith in his opinion specifically found that the denial of the building permit was an appropriate exercise of that zoning authority by the Township in his agreement with the Township that the antenna was not a use or accessory use permitted under the Zoning Ordinance. Again, Omnipoint has never challenged this determination in these proceedings.

Similarly, Magistrate Judge Smith found also that the Township and the Zoning Hearing Board of the Township did not, in the words of the statute, "unreasonably discriminate" against Omnipoint. The evidence of record reveals that several other providers such as Sprint have facilities in the Township, including those already on the KISS 100 tower. Certainly, in denying the building permit, the Township and Zoning Hearing Board of the Township

treated Omnipoint precisely the same, as recognized by Magistrate Judge Smith, as Comcast had been treated on its prior application to install wireless antenna facilities at the same site. *See AWACS, Inc. v. Zoning Hearing Board of Newtown Township*, 702 A.2d 604 (Pa. Cmwlth. Ct. 1997), *aff'd*, 559 Pa. 104, 739 A.2d 159 (1999). The decisions under the Telecommunications Act nationwide recognize the fact that, other than in certain clear, *per se* cases, case-by-case determinations are necessary in cases wherein wireless providers allege an "effective prohibition" of wireless services actionable under the statute. This case in particular, wherein the Third Circuit directed a remand for Omnipoint to develop a complete record in support of its contentions, is inappropriate for certiorari.

Omnipoint's claim that there is a conflict among the circuits is in reality a conflict of its own design. The circuit court decisions can indeed be reconciled and, further, the need for case by case determinations recognized in virtually all the decisions addressing Telecommunications Act claims limits the present usefulness of any global statement in this developing area.

The Third Circuit's requirement that there be a gap in wireless service prior to any finding that service was effectively prohibited by municipal zoning authority duly protects the interest in retaining local autonomy in zoning matters. The legislative history makes clear that this was a key congressional concern. Omnipoint would add to the provision of prohibition a carrier-specific requirement that "service [by a particular carrier] was effectively prohibited", an inclusion in the language of the statute that is unjustified by the legislative history. Omnipoint's

complaint of unfairness ignores the anti-discrimination provision in the Act.

Although Omnipoint has not directly addressed the Civil Rights Act claim in its Petition, it argues at footnote six of its Petition that that question should be addressed if Certiorari is granted. Respondents disagree with this contention, and note that the Court of Appeals in this case declined to decide this issue. (*See Omnipoint Communications Enterprises, L.P. v. Newtown Township*, 219 F.3d 240, 245 (3rd Cir. 2000)). In addition, this issue should not be addressed by this Court, as it has not yet been addressed by any of the Circuit Courts of Appeals (with the exception of the decision by the Eleventh Circuit in *AT&T Wireless PCS, Inc. v. City of Atlanta*, 210 F.3d 1322 (11th Cir. 2000), which was later vacated (*See* 2000 W.L. 1210663 (11th Cir. August 25, 2000)).

2. There is no real conflict among the circuit court of appeals decisions cited by omnipoint in its petition for writ of certiorari.

There is in fact no conflict between the Third Circuit's formulation of an applicable standard and that employed by the Second Circuit in *Sprint Spectrum, L.P. v. Willoth*, 176 F.3d 630 (2d Cir. 1999). Indeed, the Second Circuit adopted a standard identical to that applied by the Third Circuit below: "We hold only that the Act's ban on prohibiting personal wireless service precludes denying an application for a facility that is the least intrusive means for closing a significant gap in a remote user's ability to reach a cell site that provides access to land lines." 176 F.3d at 641. The reference to "significant gap"

to be filled by "least intrusive means" is, of course, merely a transposition of the two part standard adopted by the Third Circuit below. At the same time the Second Circuit in *Sprint Spectrum*, contrary to Omnipoint's assertions, in fact recognized what Omnipoint refers to as an "all carriers" requirement in its recognition that "once an area is sufficiently serviced by a wireless provider, the right to deny applications becomes broader." 176 F.3d at 643. A conflict, therefore, compelling intervention by this Court at this time is hardly raised when *Willoth* and the Third Circuit's opinion below are compared.

As further evidence of a purported conflict among the circuits, Omnipoint cites only two decisions of the Fourth Circuit and a single decision of the First Circuit. The Fourth Circuit decision in *AT&T Wireless PCS, Inc. v. City Council of Virginia Beach*, 155 F.3d 423 (4th Cir. 1998) and the First Circuit decision in *Town of Amherst, N.H. v. Omnipoint Communications Enter., Inc.*, 173 F.3d 9 (1st Cir. 1999) can similarly be reconciled with the approach taken by the Third Circuit and the Second Circuit in that the First and Fourth Circuit decisions represent essentially *per se* determinations in which whether by regulation or by practice there has been a direct prohibition of service. It is only in more subtle instances of alleged prohibition of wireless service not memorialized in regulations nor institutionalized by practice that a test such as that espoused by the Third and Second Circuits need be applicable. Indeed, in neither *Virginia Beach* nor in *Town of Amherst* is there any indication that service was being provided adequately or at all by another provider rendering those cases readily distinguishable on the merits.

To like effect, the decision of the Fourth Circuit speaking more recently than *Virginia Beach* in *360 degrees in Communications Co. of Charlottesville v. Board of Supervisors of Albemarle County*, 211 F.3d 79 (4th Cir. 2000), adopts a *per se* test hinted at by the Fourth Circuit in its earlier *Virginia Beach* decision. Even Omnipoint in its Petition for Writ of Certiorari makes clear that any rejection of the approach taken by the Second and Third Circuits in *360 degrees* represented rather a view less likely to find an effective prohibition of service than that under the tests established by the Second and Third Circuits. *See* Petition for Writ of Certiorari of Omnipoint at page 10 n.5.

Thus, there is indeed no conflict among the circuits. The Second and Third Circuit have adopted an identical test which, it is submitted, is wholly justified under the statute. The First and Fourth Circuits have addressed factually distinguishable circumstances amenable to a *per se* test applicable without the need for any reference to whether or not there is a gap in coverage but instead representing situations of hostility to all carriers either by regulation or in the practice of a municipal zoning authority.

The district court cases cited by Omnipoint serve no further purpose to demonstrate a conflict among the circuits. This Court's Rule 10(a) consideration governing review on certiorari addresses only conflicts among the circuits and the district courts' decisions are not germane to this Court's exercise of its discretion in ruling on a petition for certiorari. Moreover, the district court decisions cited by Omnipoint show no conflict.

Omnipoint Communications MB Operations, LLC v. Town of Lincoln, No. Civ. A. 99-11012, 2000 WL 1089511 (D. Mass. Aug. 2, 2000), *SNET Cellular, Inc. v. Angell*, 99 F. Supp. 2d 190 (D.R.I. 2000) and *Industrial Communications & Elec., Inc. v. Town of Falmouth*, No. 98-397, 2000 WL 761001 (D. Me. May 9, 2000) are, of course, all decisions rendered by district courts within the First Circuit which apply that Circuit's *per se* test under clear circumstances such as those addressed by the First Circuit in *Town of Amherst* and in accordance with the rule of that circuit announced in *Town of Amherst*.

The decision of the District Court for the Western District of Wisconsin in the Seventh Circuit in *APT Minneapolis, Inc. v. Eau Claire County*, 80 F. Supp. 2d 1014 (W.D. Wisc. 1999) followed *Town of Amherst* in another *per se* type of case. As such, the language cited by Omnipoint and attributed to that District Court at page 10 of Omnipoint's Petition for Writ of Certiorari is dictum.

Sprint Spectrum, L.P. v. Mills, 65 F. Supp. 2d 148 (S.D.N.Y. 1999) of the Southern District of New York in the Second Circuit involved another *per se* case wherein the court found a prohibition of service in a general rule that there could be no lease to erect a telecommunications facility where state law purportedly prohibited the lease of public property solely for the benefit of a private party.

Sprint Spectrum, L.P. v. Board of County Commn'rs of Jefferson County, 59 F. Supp. 2d 1101 (D. Colo. 1999) by the District of Colorado in the Tenth Circuit, contrary to Omnipoint's assertion at page 11 in its Petition, does not address or even discuss any so-called "all carriers" requirement. To the same effect is *Smart SMR of New York*,

Inc. v. Zoning Comm'n of Stratford, 995 F. Supp. 52 (D. Conn.1998) by the District of Connecticut in the Second Circuit. Again, the Connecticut District Court applied a *per se* rule as in *Town of Amherst* and again stated the need to examine the cases on a case-by-case basis without speaking to any "all carriers" requirement.

Sprint Spectrum, L.P. v. Jefferson County, 968 F. Supp. 1457 (N.D. Ala. 1997) of the Northern District of Alabama in the Eleventh Circuit can also be characterized as a *per se* case in that the court therein found that all carriers were being prohibited from introducing new, digital technology into the locality. Finally, another *per se* case is *Western PCS II Corp. v. Extraterritorial Zoning Auth. of Santa Fe*, 957 F. Supp. 1230 (D.N.M. 1997) wherein the District of New Mexico in the Tenth Circuit found that the "record does not support a legitimate basis for the denial" and, again, found that all carriers were being denied the opportunity to introduce new technology to the area.

It requires a strained reading of the cases to determine that there is any present conflict among the circuits which must now be resolved by this Court.

3. The Third Circuit's decision is not anti-competitive.

Omnipoint argues that what it characterizes as the Third Circuit's "all carriers" rule will create a monopoly by the first carrier to establish service in an area. Omnipoint does not argue, however, that it or other carriers are in any way precluded from establishing compatible technologies that could permit transmission of wireless communications by several carriers from a connection site

established by one of them. Any ruling that would encourage a standardized protocol among what are now competing and incompatible technologies should be encouraged.

At the same time, however, it hardly follows from any "all carriers" requirement that the first carrier to establish a transmission site in a locality will have a monopoly there. Omnipoint simply failed in the courts below to make a record that Newtown Towers was the only site available for its antenna. Without such a record, Omnipoint cannot really justify involving this Court's certiorari jurisdiction. The sole effect of the Third Circuit's decision is that the statute must be read for what it says. For there to be an effective prohibition of wireless service, that prohibition must be against service generally by all carriers and not by a single carrier by denial of a building permit at a location clearly not so zoned. Contrary to the logical conclusion from Omnipoint's arguments, the statute requires that "regulation of the placement, construction and modification of personal wireless service facilities by any state or local government or instrumentality thereof . . . shall not prohibit or have the effect of prohibiting the provision of personal wireless services" generally. The statute does not purport to limit local governmental regulation with "the effect of prohibiting the provision of personal wireless services" *by a particular carrier*. In the event that any municipal authority prohibits service by particular carrier *not authorized under its zoning ordinance or other legal authority*, Omnipoint and other carriers have ready reference to the protections of the anti-discrimination provisions set forth in the same section of the statute.

4. The facts of this case present a poor and incomplete record for a global statement of standards to be adopted by the court.

This case, again, represents a factually poor circumstance for Omnipoint's challenge. In this case, Omnipoint has never argued that it was discriminated against vis-a-vis other carriers and in this case there was abundant evidence of record that other sites are available for erection of Omnipoint's proposed facility.

Omnipoint's engineers testified at the Board that they did not consider alternate sites and they certainly did not do so prior to making an application for the building permit or prior to the appeal proceedings before the Zoning Hearing Board. They did not do studies as to the light industrial district referred to in the record as the deBotton property in the western reaches of the Township, and apparently never did as to the light industrial district occupied by SAP America. There was a great deal of evidence presented to the Zoning Hearing Board indicating availability of other sites for location of the antenna and related electronics in the Township together with other technical improvements such as stronger transmitters or the use of repeaters which could suit Omnipoint's needs.

The evidence was clear that under the zoning ordinance, erection of the antenna and related structures at the Newtown Towers site was impermissible. Magistrate Judge Smith so held. It also appears clear in the record that prior to the proceedings in the Zoning Hearing

Board below Omnipoint had early on settled on the Newtown Towers site as the "optimal" location. In the proceedings before the Board, Omnipoint's witnesses candidly acknowledged that that location was the only one they scouted.

Furthermore, Omnipoint's insistence on the Newtown Towers site was dictated by factors if not within its control certainly permitted by Omnipoint to exist, *i.e.*, the nature of its equipment and the location of its other antenna facilities outside of Newtown Township. For instance, there was testimony before the Board regarding erection of an antenna in Marple Township, a municipality adjoining Newtown to the east. The Marple site is far to the easterly end of that Township, close to Haverford Township (the township to the east of Marple) at the intersection of Lawrence Road and West Chester Pike near Interstate 476. Had, for instance, Omnipoint chosen to pursue an antenna site at a more westerly point in Marple Township closer to the Newtown Township border not only would the Newtown Towers site not have been essential for "optimal" coverage but, further, an antenna might not have even been necessary in Newtown Township at all to fill any gap between a Marple antenna and Omnipoint's proposed site for an antenna in Edgmont Township adjoining Newtown Township to the west. Perhaps even another site in Newtown would have satisfied Omnipoint. Newtown Towers was hardly the least intrusive alternative. Omnipoint has not made a record; hence, the Third Circuit's remand.

The problem that Omnipoint creates is obvious. Newtown, like other municipalities, must establish its zoning districts and must provide zoning allowing such antennas

in appropriate parts of the Township before Omnipoint, Sprint or any other provider appears at its Township offices with an application for a building permit. Newtown Township in good faith zoned to allow antennas in three different parts of the Township. Omnipoint, however, now appears on the scene claiming that it must, because of the limits of its own equipment and because of other antenna locations used by it, erect an antenna in a wholly different part of the Township not zoned to permit an antenna. Omnipoint now claims that the Township must allow Omnipoint's chosen site or will be deemed to have "prohibited" wireless service in the Township. Unfortunately for municipalities, Omnipoint's chosen equipment and chosen antenna locations mandate the location; a Township, however, has no "crystal ball" with which to predict how to draw its zoning classifications based on a wireless phone provider's desires and under Omnipoint's view will have its zoning ordinance ignored if it is not clairvoyant.

Even assuming that availabilities of antenna sites within Newtown Township were reasonably limited by Omnipoint's antenna sites in adjoining townships such as Edgmont to the west and Marple to the east there is substantial evidence in the record showing that even the Newtown Towers site was not essential.

Bernard Nelson, an expert witness retained by the Township at its expense in the proceedings before the Board, testified at length about the availability of the so-called KISS 100 tower as a satisfactory site for an antenna facility that could meet Omnipoint's needs even given the circumstances of the location of antennas in adjoining townships.

There was further the evidence provided by the drive through survey by Building Inspector Mr. McHatton of the Township regarding his success using not only a Sprint phone but also an Omnipoint wireless telephone throughout the Township, finding difficulty only west of Pennsylvania Route 252. This drive-through survey, it must be remembered, was performed without Omnipoint establishing any antenna facility at the Newtown Towers or elsewhere in the Township and belied Omnipoint's proffered evidence to the effect that the Newtown Towers site was necessary to enable wireless transmissions in the easterly portion of the Township, *i.e.*, east of Route 252.

There was further the evidence in the record establishing the availability of other alternative sites for installation of the antenna and associated electronics in addition to the KISS 100 tower. There are, as established in the record before the Board, two light industrial districts, one occupied by SAP America and another being the so-called deBotton tract in the westerly section of the Township. There was substantial evidence these sites were available for and suitable for installation of an antenna.

Thus, with alternative sites established in the record below, Omnipoint's argument that there was only a single site available for installation of the antenna at the SAP America property is unsupported by the record. Further, the evidence is clear that Omnipoint took no action whatsoever to attempt to deal with the owner of the SAP America property until after the proceedings before the Board had begun. In fact, what little efforts were taken by Omnipoint to attempt to negotiate an antenna site lease at the SAP America property included apparently only a

half-hearted effort which included an offer of lease payments of only one-half of the amount theretofore agreed to be paid by Omnipoint to the owner of the Newtown Towers.

The argument that alleged refusal of a single landowner to lease space for an antenna was addressed by the Third Circuit's reasoned opinion in *APT Pittsburgh, supra:*

> "Pennsylvania's rule against exclusionary zoning does not impose upon a township the duty to assure that all providers, regardless of the systems they have chosen to construct, will have a suitable site for a functioning tower within the township. To be exclusionary, the ordinance must effectively foreclose not only [the applicant's] use, but all use."

The fact of other providers maintaining antennas at the KISS 100 tower as well as Mr. McHatton's success in his drive-through wireless test through the Township belies any contrary argument by Omnipoint. The mere "negative response" by SAP America should rate no more than was the case in *APT Pittsburgh*. An offer of only one-half of what was paid to the owner of the Newtown Towers hardly demonstrates the "economic infeasibility" reasonably required by the Third Circuit in *APT Pittsburgh*.

5. Omnipoint's arguments are not bolstered by the recent legislation cited in its petition.

Pointing to the Wireless Communications and Public Safety Act of 1999, Pub. L. No. 106-81, Omnipoint

attempts to portray the Respondents' good faith enforcement of valid zoning laws as contrary to the will of Congress if not a danger to the public. A reading of that statute, however, reveals little support for Omnipoint's position. What this Act did, as described in President Clinton's Signing Statement, bore little relation to any dissatisfaction with any "all carriers" requirement:

> "The legislation I am signing today will improve emergency wireless communications in several ways. First, it will make 9-1-1 the universal number. . . . Second, it will encourage statewide coordination of the efforts of public safety and law enforcement officials to protect our citizens and save lives. Finally, it will increase private sector investment in emergency wireless services by providing wireless companies with the same level of liability protection that 'wireline' telecommunications companies have."

Statement by President William J. Clinton on signing S. 800, 35 Weekly Compilation of Presidential Documents (10/26/99).

Indeed, the Committee reports on the statute indicate that the main purpose of the bill was to standardize the use of 9-1-1 for emergency calls, a purpose which bears no relation to Omnipoint's arguments in this case.

CONCLUSION

For all of the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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No. 00-353

IN THE

SUPREME COURT OF THE UNITED STATES

OMNIPOINT COMMUNICATIONS ENTERPRISES, L.P.,
Petitioner,

- v. -

NEWTOWN TOWNSHIP AND
THE ZONING HEARING BOARD OF NEWTOWN TOWNSHIP,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

REPLY OF RESPONDENTS TO MOTIONS FOR LEAVE TO FILE AND BRIEFS OF AMICI CURIAE DOBSON COMMUNICATIONS CORPORATION, SPRINT SPECTRUM , L.P. AND AT&T WIRELESS SERVICES, INC., NEXTEL COMMUNICATIONS, INC., AND SBC WIRELESS, INC.

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Pending before the Court are Motions for Leave to File as Amici Curiae by Dobson Communications Corporation (hereinafter "Dobson Motion"), Sprint Spectrum, L.P. (hereinafter "Sprint Motion"), and AT&T Wireless Services, Inc., Nextel Communications, Inc., and SBC Wireless, Inc. (hereinafter "AT&T Motion"). Each Movant is a wireless telephone company; other than in the Sprint Motion, none of the Movants purports to assert any interest in any way different than that raised by Petitioner Omnipoint Communications, L.P. (hereinafter "Omnipoint") in its original Petition for Certiorari. In fact, the Sprint Motion claims a differing interest on a basis not relevant to this case. In the absence of any new perspectives to be brought by these Movants, their participation adds nothing to what has already been raised by Omnipoint.

Movants claim that the Third Circuit's decision misconstrues the ability of wireless telephone users to communicate using competing carriers' transmission facilities. In fact, nothing in the Third Circuit's decision indicates any such misapprehension. To the contrary, as argued in Respondent's Brief in Opposition to the Petition for Writ of Certiorari of Omnipoint, the Third Circuit construed the "effect of prohibiting" provision in the Telecommunications Act in a way required by the statutory language. Rather than assuming that wireless telephone users can make or receive phone calls regardless of which carrier's antenna is established in a given area, the Third Circuit recognized that a zoning decision in an individual case cannot have an effect of prohibiting wireless service wherein in fact wireless service is established in an area whether it be by one carrier or another.

The primary position urged by each of the Movants is that the Third Circuit's decision will somehow be anti-competitive in that, according to the Movants, once one wireless carrier has established a presence in a locality, local zoning authorities can deny further zoning applications with impunity. Sprint's claim is that their status as the "incumbent"carrier in the Newtown Township area therefore brings them their differing perspective on this case. This spectre of unlimited competition raised by the Movants was addressed in Omnipoint's Petition for Writ of Certiorari.

The concern that an incumbent carrier either alone or in collusion with municipal authorities could prevent additional carriers from establishing transmission sites in a given locality ignores the full context of the Telecommunications Act. The Statute provides:

"(7) Preservation of local zoning authority
(A) General authority

> Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.
>
> (B) Limitations
>
> (i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof–
>
> (I) shall not unreasonably discriminate among providers of functionally equivalent services; and
>
> (II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.
>
> (ii) [Omitted]
>
> (iii) Any decision by a State or local government or instrumentality to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record."

It is also important to remember that the case now before the Court on Omnipoint's Petition for Writ of Certiorari is a case in which the proposed antenna and electronic facilities to be erected by Omnipoint were violative of the local zoning ordinance and other sites establishing such facilities are available under the zoning ordinance.

The Statute does not expand the "effect of prohibiting" protection to carriers by requiring that it have the effect of prohibiting service by a particular carrier. Protections to the disappointed wireless carrier seeking to establish a transmission facility in a given locality include the requirement that a decision must be made promptly, the requirement that any decision must be supported by substantial evidence and the provision that local municipalities must not discriminate among carriers.

Clearly, in the event that there is activity by an entrenched carrier either alone or in collusion with a municipality to block out competing carriers, the anti-discrimination provision would be called into play. Again, factually, it bears repetition that a competitor of Petitioner Omnipoint had been previously denied in its application to erect a cell phone facility at this same location in this case.

Any wireless carrier which desires to establish a transmission facility in a given locality must first start with proposing a facility which is compliance with applicable zoning. Omnipoint did not do so in this case.

In the event that a wireless carrier makes an application, whether it is the first carrier to establish a site in a given locality or is a newcomer, the application must be ruled on promptly. Any denial must be based on substantial evidence subject to review by the Federal Courts under the Act. Neither Petitioner Omnipoint nor any of the amici indicate how an incumbent carrier either alone or in collusion with a municipality could contrive to a denial of an application to erect a facility that would pass muster under the substantial evidence review applicable in the district courts.

Finally, in the event that any such a denial could somehow pass muster under the substantial evidence review standard, neither Petitioner Omnipoint nor any of the amici address the anti-discrimination provisions in the statute which would clearly be brought into play if subsequent applicants seeking zoning permission to erect a telecommunications facility were treated differently than any incumbent carrier.

As argued heretofore by Respondents, this case represents a poor factual scenario for resolving any questions under the "effect of prohibiting" provisions of the Telecommunications Act. Here, clearly, in addition to the requested site prohibited under the zoning ordinance, several sites

available for erection of telecommunications facilities were available under the zoning ordinance of Newtown Township. Sprint's own argument that it has a facility in place shows as much. In addition, there was substantial evidence in the record that any of these additional sites would be satisfactory for Petitioner's Omnipoint's needs.

Finally, although they seek leave to intervene in the case, none of the Movants bring any new perspectives to the attention of the Court and, in fact, they fail to provide any indication of what they would request this Court to establish as the applicable standard. The only exception is in the AT&T Motion which suggests: "For the prohibition to have any efficacy, it must be applied in a manner that permits each provider to erect facilities necessary to provide service to its subscribers." (AT&T Motion at pg. 16). If this is the position to be urged to this Court by the Movants, it will be a position directly contrary to the legislative history of the statute indicating that local zoning authority is to be preserved. Movants argue that the Third Circuit's construction of the "effect of prohibiting" provision in the statute would somehow grant carte blanche to incumbent carriers and/or municipalities to deny zoning applications; they would apparently replace that situation with carte blanche of their own to erect facilities regardless of local zoning ordinances in contravention of the will of Congress as set forth in the recognition of the retention of local zoning authority as set forth in the Telecommunications Act.

For all of the foregoing reasons it is respectfully submitted that the Motions should be denied.

Respectfully submitted,

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Dated: October 16, 2000

No. 00-353

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On Petition for Writ of Certiorari to the
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CERTIFICATE OF SERVICE

I, BRUCE A. IRVINE, ESQUIRE, attorney for Newtown Township and the Zoning Hearing Board of Newtown Township, hereby certify that I am a member of the Bar of this Court and on this 16th day of October 2000, I served three copies of the Reply of Respondents to Motions for Leave and Briefs of Amici Curiae Dobson Communications Corporation, Sprint Spectrum, L.P and AT&T Wireless Services, Inc., Nextel Communications, Inc., and SBC Wireless, Inc. by United States First Class Mail, postage prepaid, upon the required parties listed below pursuant to Rule 29 of the Rules. I hereby certify that all required parties have been served.

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to the United States Court of Appeals
for the Third Circuit

MOTION FOR LEAVE TO FILE AND BRIEF OF *AMICUS CURIAE* DOBSON COMMUNICATIONS CORPORATION IN SUPPORT OF PETITIONER

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No. 00-353

In the Supreme Court of the United States

OMNIPOINT COMMUNICATIONS ENTERPRISES, L.P.,

Petitioner,

v.

NEWTOWN TOWNSHIP
AND
THE ZONING HEARING BOARD OF NEWTOWN TOWNSHIP,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO FILE AND BRIEF OF *AMICUS CURIAE* DOBSON COMMUNICATIONS CORPORATION IN SUPPORT OF PETITIONER

Amicus curiae Dobson Communications Corporation hereby submits its motion for leave to file its brief in support of the petition for a writ of *certiorari* to the United States Court of Appeals for the Third Circuit filed by Omnipoint Communications Enterprises, L.P., and includes herewith its brief.

MOTION FOR LEAVE TO FILE

Pursuant to Supreme Court Rule 37.1, Dobson Communications Corporation ("Dobson") respectfully moves this Court for leave to file the annexed brief *amicus curiae* in support of the petition for writ of certiorari filed by Omni-

point Communications Enterprises, L.P. ("Petitioner" or "Omnipoint").[1]

The issues presented by this case are critical to the proper interpretation of 47 U.S.C. § 332(c)(7)(B)(i)(II), which proscribes local governments from regulating the placement, construction, or modification of wireless facilities so as to "have the effect of prohibiting the provision of personal wireless services." Dobson is a provider of such personal wireless services; its subscribers rely on the networks of wireless facilities of Dobson and other providers cooperating with Dobson nationwide to use their wireless phones. Dobson and other wireless providers seek to provide coverage throughout their designated service areas that is as nearly "seamless" as possible, minimizing or eliminating "dead spots" in areas where subscribers are likely to seek to use their phones. On its face, Section 332(c)(7)(B)(i)(II) is intended to facilitate the location of transmitting facilities (antennas and towers) so as to avoid such dead spots, or gaps in coverage. The Court of Appeals, however, adopted an interpretation of this Section that allows local authorities to impede the placement of transmitting facilities where needed, on the theory that if there is any existing wireless service covering a given area, other competing providers need not be allowed to extend their coverage to such area.

The effect of this ruling will be to diminish the availability of service to Dobson's subscribers, because the service that may exist in a given area may not be usable by Dobson's subscribers. In addition to serving its own subscribers, Dobson serves as a roaming partner for other wireless service

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[1] Counsel has been informed that Petitioner is today filing its "Consent to Briefs by *Amicus Curiae*" with the Court. Counsel for Respondent, however, has informed undersigned counsel that the Respondent declines to consent. Accordingly, Dobson is obliged to move for leave to file its brief as *amicus curiae*.

providers. Thus, when one of its partners' subscribers is in an area served by Dobson, the subscriber can make and receive calls to and from the national telephone network through Dobson's facilities. If a gap in Dobson's coverage exists, the subscriber cannot access the network via Dobson's facilities, and the subscriber's phone may not be usable to place or receive calls over another system or may be usable only if the subscriber agrees to pay higher charges. Also, the subscriber may not be able to receive calls as a roamer over the other system if the system operator does not have a roaming agreement with the subscriber's home system.

As a rural and suburban wireless provider, Dobson believes its perspective will assist the Court in understanding the importance of the proper interpretation of Section 332(c)(7)(B)(i)(II). Because Dobson is not a provider with a nationwide presence, it must rely on other providers to make "roaming" service available to its subscribers in markets where it does not operate. Thus, a rule that makes it more difficult for either Dobson or its roaming partners to serve its subscribers' phones in a particular area, merely because some other carrier (whose service may not be technically compatible with the subscriber's phone) has service available in that area, will adversely affect the availability of service to subscribers of Dobson and other similarly situated service providers.

Moreover, the lack of uniformity resulting from the divergent rules propounded by the several Court of Appeals that have interpreted Section 332(c)(7)(B)(i)(II) further impedes the provision of ubiquitous wireless service relied on by the nation's 86 million wireless subscribers. Dobson and most other providers must plan, build, manage, and operate personal wireless service networks in multiple states. Dobson operates in 18 states, for example. The existence of fundamentally different rules concerning the establishment of com-

peting wireless service facilities from circuit to circuit adds needless complexity, uncertainty, and cost to the provision of this technologically challenging and publicly beneficial service.

For the foregoing reasons, Dobson respectfully moves the Court for leave to file the brief that follows.

BRIEF OF *AMICUS CURIAE* DOBSON COMMUNICATIONS CORPORATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

Dobson Communications Corporation is a provider of personal wireless services in rural and suburban locations. Dobson participates in the provision of these services through its own wireless systems and through systems owned by American Cellular Corporation, a joint venture equally owned by Dobson and AT&T Wireless, altogether serving a total of 1,045,200 subscribers in 71 markets in 18 states, with a population of 11.5 million potential subscribers. Dobson has an interest in this case because of the potential negative impact of the Court of Appeals' decision on the range and quality of wireless services that wireless carriers will be able to provide to consumers.

Dobson began its wireless operations in 1990 with cellular systems in Oklahoma and the Texas Panhandle, and it has rapidly expanded its cellular operations with a primary focus on areas with a substantial need for wireless communications. As of June 30, 2000, Dobson itself owned over 39 cellular markets in 13 states with 556,700 subscribers and managed cellular systems that cover a total population of approximately 6.6 million. The company's managed network is made

up of 25 switching centers and over 1,000 cell sites throughout the United States. Taking into account its joint venture with AT&T and American Cellular Corporation, Dobson is the eighth largest wireless provider in the United States.

Dobson has an aggressive business plan for building out its network in rural and suburban areas where there is a substantial need for wireless communications. In order to provide adequate wireless services to its consumers, Dobson must be able to install facilities in municipalities where it is licensed to serve. During 2000 and 2001, Dobson's plans call for about 279 transmitter locations to be constructed. Of these, 42 new proposed towers are to be constructed by Dobson itself and 84 new proposed towers are to be constructed by American Cellular. In 2001, current plans call for 79 new proposed towers to be constructed by Dobson itself and 74 new proposed towers to be constructed by the American Cellular joint venture. These figures make clear that Dobson will be vitally affected by its ability to construct new transmitting facilities. If Dobson is unable to build these new facilities due to local zoning and regulatory determinations premised on the fact that an alternative service provider already serves the area, Dobson will be unable to provide service in areas where its subscribers expect it.

This case will have a major effect on wireless carriers such as Dobson. At issue is whether local governments may decide not to authorize the construction of wireless facilities merely because there is another wireless service in the same area, given the prohibition by 47 U.S.C. § 332(c)(7)(B)(i)(II) on such officials taking actions that prohibit, or have the effect of prohibiting, the provision of personal wireless services.

In the case below, the Court of Appeals found that denial of an individual application to install a facility at a particular location in order to fill a provider's gap in coverage is not a "prohibition" of personal wireless service so long as the area

to be covered by that facility is being served by another carrier. The First, Second, and Fourth Circuits have followed different approaches to the interpretation of Section 332(c)(7)(B)(i)(II) from that of the Third Circuit. As a result, there are different and conflicting rules in the four circuits that have addressed the matter. Dobson is clearly adversely affected by the lack of a nationally uniform interpretation of this Section, and urges this Court to grant the Petition so that these conflicts may be remedied and the law in this area clarified. Accordingly, Dobson joins petitioner in respectfully requesting that this Court provide clarification regarding the standards used to determine which actions are subject to the statutory prohibition under section 332(c)(7)(B)(i)(II).

SUMMARY OF ARGUMENT

This case involves the interpretation of a provision of the Telecommunications Act of 1996 that is of great import to the wireless communications industry and its subscribers. The particular provision at issue clearly states what Congress sought to accomplish: state and local governments that regulate wireless facilities such as towers and antennas may not "prohibit or have the effect of prohibiting the provision of personal wireless services." 47 U.S.C. § 332(c)(7)(B)(i).

Surprisingly, the Courts of Appeal have reached wildly divergent conclusions on what Congress meant when it restricted local governments ability to "prohibit or have the effect of prohibiting the provision of personal wireless services." Some of the interpretations by the Courts of Appeal in fact give local governments broad rein to take actions that prohibit wireless providers from providing personal wireless services, either directly or indirectly, contrary to the express will of Congress as expressed in the statute.

The Third Circuit decision below is such a case. The Court below has held that a local government has the authority to deny a wireless provider the ability to construct facilities that it needs to provide service to fill a gap in its coverage, and that such a denial does not prohibit, or have the effect of prohibiting, the provision of personal wireless service *as long as some other wireless provider has coverage in the affected area.* The results of this decision are that a provider may be prohibited from ensuring that its subscribers receive service and that subscribers may be denied the ability to use their phones in the affected area, because the mere existence of some form of wireless telephone service in that area does not ensure that the subscribers will be able to access the personal wireless services to which they subscribe.

Three other Courts of Appeals have addressed the "prohibit, or have the effect of prohibiting" clause, and each has reached different conclusions from the other courts. The Fourth Circuit has held that the "prohibit, or have the effect of prohibiting" restriction applies almost exclusively to the establishment of formal policies banning the construction of wireless facilities. Only the repeated denial of *seriatim* siting requests by a provider would suffice to show the "effect of prohibiting," in the Fourth Circuit's view.

The First Circuit has acknowledged that an individual denial of a wireless provider's siting request may constitute a prohibition, or have the effect of a prohibition, but it has placed a substantial burden on the provider to demonstrate that this is the case, effectively forcing the provider to show that the local government is so hostile to siting requests that it would be futile to pursue alternatives. The Second Circuit, on the other hand, has limited the applicability of the restriction on local site regulation by holding that regulators may deny a provider's request and instead mandate the "least intrusive" way of serving a particular area.

The Court of Appeals decisions collectively impose substantial obstacles to wireless providers' deployment of facilities that Congress clearly sought to facilitate. Thus, the will of Congress has been undone. The issue of local governmental restrictions on wireless facility siting is crucial to the seamless growth of competitive wireless services and to provision of reliable service to the public. This issue was sufficiently important that Congress enacted Section 332(c)(7)(B)(i)(II). Due to the divergence among the Courts of Appeals in the application of this provision, and the promulgation of several interpretations that undermine Congress's intention to resolve the issue in favor of the widespread availability of wireless service, an important issue of federal law exists that requires resolution by this Court.

REASONS FOR GRANTING THE PETITION

The case before the Court involves the interpretation of a provision of the Telecommunications Act of 1996 that is of great import to the wireless communications industry and its subscribers. This case presents the straightforward issue of what Congress sought to accomplish by plain and clear language. The statutory provision at issue stated Congress's intention to place limits on local governments' authority to regulate the "placement, construction, and modification" of facilities such as towers and antennas used for the provision of personal wireless services. In particular, the statute provides that in regulating such facilities, governments —

> (I) shall not unreasonably discriminate among providers of functionally equivalent services; and
>
> (II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

47 U.S.C. § 332(c)(7)(B)(i). The Courts of Appeals have reached widely divergent conclusions as to what limits, if any, the "prohibit or have the effect of prohibiting" language in Section 332(c)(7)(B)(i)(II) places on local regulators. The conflict among the circuits causes uncertainty in the industry and impedes the seamless provision of service. Moreover, the interpretations of all the Courts of Appeals give undue freedom to state and local regulators to impede wireless facility deployment, which undermines what Congress sought to accomplish: namely, the seamless build-out of multiple competing wireless service providers.

I. THE COURT OF APPEALS' DECISION CONFLICTS WITH OTHER CIRCUITS, REQUIRING CLARIFICATION BY THIS COURT TO AVOID INCONSISTENT RESULTS AND DAMAGING EFFECTS

The Court of Appeals decision applied a two-pronged test to determine whether a local action violated the prohibition set forth in Section 332(c)(7)(B)(i)(II). The first prong of this test was to determine whether local zoning policies and ordinances "result in 'significant gaps' in the availability of wireless services." *Omnipoint Communications Enterprises, L.P. v. Newtown Township*, 219 F.3d 240, 241 (3d Cir. 2000). In order to ascertain the adequacy of a provider's showing that a significant gap exists, the Court followed the standard it had recently established in *APT Pittsburgh Limited Partnership v. Penn Township*, 196 F.3d 469 (3d Cir. 1999), which requires carriers to supply "evidence that the area the new facility will serve is not already served by another provider." *APT*, 196 F.3d at 480. This second prong that the Court of Appeals added significantly cuts back the limitation on local government authority prescribed by Congress. As applied by the Third Circuit, the statute prevents local authorities from regulating only where the regulation prohibits all service by

all providers; if there is *any* service from *any* provider, the Court of Appeals considers that there is no prohibition. Petitioner refers to this standard as the "all carriers" requirement.

The "all carriers" requirement is nowhere contained in the statute, and indeed it is directly contrary to the objectives Congress sought to achieve, as discussed below. Moreover, none of the other Courts of Appeals that have considered the interpretation of this statutory provision have reached the same conclusion as the Third Circuit. Indeed, the other Courts of Appeals have adopted a surprisingly wide variety of readings of this statutory provision, leading to a clear split among the circuits. As detailed in the Petition, the United States Courts of Appeals for the First, Second and Fourth Circuits have adopted different and inconsistent approaches to determining whether denials of applications by local governments have the effect of prohibiting the provision of personal wireless services and therefore are subject to the ban in Section 332(c)(7)(B)(i)(II). Below, Dobson discusses how the unsettled state of the law is a matter of great importance not only for wireless providers, but also for the members of the public who rely on personal wireless services and expect their service to be available without significant coverage gaps, whether or not another provider has coverage.

A. The Fourth Circuit Would Allow Local Governments to Prohibit the Provision of Wireless Services through Case-Based Denials

The Fourth Circuit's interpretation of the statutory provision at issue is far more limiting than even the Third Circuit's "all carriers" requirement. In *AT&T Wireless PCS, Inc. v. City Council of Virginia Beach*, 155 F.3d 423 (4th Cir. 1998), the Fourth Circuit found that the provision only applies to "blanket prohibitions" and "general bans or

policies." Even though the court suggested that the policies in question need not be explicit, it was unwilling to adopt a broader application that would include individual case-based denials.

The *Virginia Beach* decision ignores the practical reality that the denial of a single application may prevent a wireless carrier from providing services in a given area. Different carrier networks are based on a variety of designs and a broad range of differing technologies.[2] As such, the impact of the denial of an application may vary widely from carrier to carrier. It is possible that the denial of a single application for a carrier may present that carrier with no alternative but to leave a large gap in coverage in a particular geographic area, while the denial of a similar application for a second carrier might not produce such a result. Thus, a general policy need not be implemented for a local government to effectively prohibit the provision of the personal wireless services for which the denied provider sought authority.

The Fourth Circuit's interpretation is not shared by other Courts of Appeals. Indeed, the First Circuit has specifically rejected the notion that only a general policy, such as a ban on towers, would constitute a prohibition. The First Circuit recognized that in some instances a carrier's proposal may be "the only feasible plan" and as such, "prohibiting its plan might amount to prohibiting personal wireless service." *Town of Amherst, N.H. v. Omnipoint Communications Enterprises, Inc.*, 173 F.3d 9, 14 (1st Cir. 1999).

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[2] Wireless carriers utilize a variety of frequency bands and several analog and several different digital transmission technologies. A subscriber's phone will work with the particular combinations it was designed for. Some phones will only work in a single frequency band and a single technology. For example, a 900 MHz analog cellular phone cannot operate with an 1800 MHz digital system.

Further, the Fourth Circuit's unwillingness to consider case-based denials contradicts the statutory scheme of section 332(c)(7)(B). *Virginia Beach* requires that carriers provide evidence of a general ban or policy against the installation of wireless facilities. If no explicit policy exists, then the carrier would be forced to wait until it had suffered a series of denials, to be able to make a sufficient showing that an implicit ban was in place. As noted by the Second and Third Circuits, such a lengthy process appears to contradict the scheme that Congress put in place in 47 U.S.C. § 332(c)(7)(B)(v), which established a process for expedited appeals such that conflicts over the legality of local regulation could be resolved quickly.

The Fourth Circuit standard may also allow local authorities to circumvent the section 332(c)(7)(B)(i)(II) prohibition by simply never adopting a formal policy banning wireless facilities. Indeed, the Fourth Circuit's approach effectively embraces a variant on the Third Circuit's "all carriers" requirement, in that the existence of a single wireless carrier's coverage could be used as evidence that there is no prohibition policy, formal or informal. The Second Circuit criticizes the Fourth Circuit's conclusion on this very ground. The Second Circuit opines that this standard "would lead to the untenable result that once personal wireless services are available somewhere within the jurisdiction of a state or local government ... the state or local government could deny any further applications with impunity." *Sprint Spectrum L.P. v. Willoth*, 176 F.3d 630, 641 (2d Cir. 1999).

In *360 Degrees Communications Co. of Charlottesville v. Board of Supervisor of Albemarle County*, 211 F.3d 79 (4th Cir. 2000), the Fourth Circuit reaffirmed its holding that local policies and general bans were statutorily prohibited. Addi-

tionally, the Court there stated that case-based denials would be considered evidence of a prohibition only where there are "indications by a local government that repeated individual application will be denied because of a generalized hostility to wireless services could also violate [the statute]." 211 F.3d at 86. Despite this broader approach, the Fourth Circuit decision would likely still force carriers to wait until after they have suffered a series of denials or gathered other evidence of a generalized hostility, in order to make a sufficient showing of an implicit ban by the State or local government. Such a standard is contrary to the statutory scheme in section 332(c)(7)(B)(v).

B. The First Circuit's "Hostility" Requirement Contradicts the Statutory Scheme

The First Circuit addressed the Section 332(c)(7)(B)(i)(II) prohibition in *Town of Amherst*. There, the Court of Appeals properly recognized that certain individual decisions could amount to an effective prohibition on personal wireless service. The Court immediately diminished the effect of this determination, however, when it held that the carrier bore a heavy burden to show that "further reasonable efforts are so likely to be fruitless that it is a waste of time to even try," for example by showing that the government agency has a "fixed hostility" to granting the needed clearance. *Town of Amherst*, 173 F.3d at 14. The effect of this "hostility" requirement depends on the criterion used by the courts to determine whether a generalized hostility existed. As discussed above, the appropriateness of this standard will depend on the evidence that the court requires carriers to present to make a showing of the existence of such hostility, and whether such an approach would conform to the statutory scheme set forth in Section 332(c)(7)(B)(v).

C. The Standard Adopted by the Second Circuit Fails to Take into Account Consumers' Interests

The Second Circuit's *Willoth* decision held that Section 332(c)(7)(B)(i)(II) prohibits State and local governments from denying an application for a facility that is the "least intrusive means for closing a significant gap in a remote user's ability to reach a cell site that provides access to land-lines." 176 F.3d at 643. This approach recognizes that the denial of a certain applications may result in significant gaps in reliable service coverage by a particular carrier, and as such, would violate the section 332(c)(7)(B)(i)(II) prohibition.

The Fourth Circuit has criticized the Second Circuit's approach, reasoning that by limiting the statutory prohibition to denials of the "least intrusive means" for covering a gap, the Second Circuit fails to take into account the possibility that "a community could rationally reject the least intrusive proposal in favor of a more intrusive proposal that provides better service or that better promotes the commercial goals of the community." *360 Degrees*, 211 F.3d at 87.

D. Review by This Court Is Needed

In 1999, the wireless industry experienced a 24% increase in the number of wireless subscribers, from 69.2 million to 86 million subscribers.[3] To accommodate this growth, wireless carriers such as Dobson must be able to install the necessary facilities in the markets that they serve in order to satisfactorily meet consumers' demand for wireless services. Consumers expect to be able to use their wireless devices reliably virtually everywhere, particularly in their home markets. The

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[3] *See* Federal Communications Commission, *Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Services*, FCC 00-289, 2000 FCC LEXIS 4372 at *9 (2000) (*CMRS Competition Report*).

public has become increasingly reliant on wireless service for security and safety, including for emergency communications. Accordingly, wireless providers need to fill gaps in coverage where subscribers are likely to use their wireless devices.

To fill these gaps, providers must construct towers, antennas, and other facilities, many of which require local governmental clearances. A vast number of actions must be taken by local authorities regarding the placement, construction and modification of wireless facilities. As a result, there are many denials of authority, which in turn results in many lawsuits seeking review of the state or local governments' actions under Section 332(c)(7)(B)(i)(II). To date, suits have been addressed by four Courts of Appeals, which have followed divergent views of the limits that Section places on state and local authorities' authorization to act adversely to wireless providers. In light of the lack of any common decisional principles, it is not reasonable to expect that the split among the circuits can be resolved any time soon. Indeed, as more circuits consider the statute, one can expect even more diverse interpretations, if the past is any indicator — unless this Court intervenes to provide guidance.

This statute has immediate effects on wireless providers and their customers. Waiting for many years to pass while the circuits thresh out the optimum interpretation is not in the public interest. Wireless providers must invest large amounts of money in facilities in order to provide reliable, ubiquitous service in response to the demands of their subscribers. Uncertainty will discourage this investment and will deprive the public of the personal wireless services that Congress wanted to facilitate. Clarification of the applicable standard for analyzing this statutory prohibition by this Court would assist the lower courts by providing them with the necessary guidance in this area.

II. THE COURT OF APPEALS DECISION VIOLATES THE TELECOMMUNICATIONS ACT OF 1996

A. The Court of Appeals Decision Contradicts the Prohibition in Section 332(c)(7)(B)(i)(II)

As discussed above, the court of appeals decision held that in denying an carrier's application, the government did not violate Section 332(c)(7)(B)(i)(II), unless carriers are able to show that the area where the carrier proposed to install its facilities and provide service was "not already served by another provider." *Omnipoint Communications Enterprises*, 196 F.3d at 480. In other words, the Court of Appeals views only a ban on service by *all carriers* to be a prohibition subject to the provision.

Dobson respectfully submits that the "all carriers" requirement is an inappropriate standard for determining whether there is a significant gap in the availability of wireless services, and it undermines and contradicts the express intent of Congress.

This standard fails to take into account whether consumers will experience a significant gap in coverage for the services to which they have subscribed. The fact that a particular geographic area is served by one wireless carrier does not mean that customers will be able to access this service. Different wireless carriers in the same geographic market are licensed to operate in different frequency ranges. For example, cellular systems operate in the 800 MHz range whereas Personal Communication Services ("PCS") systems operate in the 1900 MHz range. Thus, in a locality where only cellular service is available, a PCS subscriber will not be able to the wireless service unless the subscriber is using a dual band phone.

The effect of this ruling will be to diminish the availability of service to subscribers, because the service that may exist in a given area may not be readily usable, or even usable at all, by subscribers to a given provider's service. If the existing service uses a frequency band or technical standard that is not supported by the subscriber's phone, the subscriber's phone will simply display the "NO SERVICE" indicator. If the existing service is technically compatible with the subscriber's phone, the subscriber may be able to place calls at a much higher charge than on their own provider's system. However, the subscriber may be unable to receive calls; when a call is placed to a subscriber located in a part of the subscriber's service area that has a coverage gap, the calling party will typically get a recorded message stating that the called phone is unavailable, unless special arrangements have been made between the providers for automatic home market roaming.

Likewise, the different technologies and standards used by different carriers' networks may also prevent customers from accessing wireless services to which they are not subscribed. For example, Dobson currently operates a cellular network that primarily uses TDMA (Time Division Multiple Access) technology.[4] If a Dobson customer attempted to access wireless service in an area served by a carrier using CDMA (Code Division Multiple Access) technology,[5] the Dobson customer would not be able to access this service unless the customer is using a dual mode phone equipped to access both TDMA and CDMA networks. Subsequently, if the Dobson customer were to drive to an adjacent market, where the local govern-

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[4] TDMA is a digital technology that allows multiple users to share the same voice channel by having each conversation transmitted alternately over short lengths of time.

[5] CDMA is a digital technology that separates communications by code, allowing a system to mix a number of calls into the same channel.

ment has allowed only one carrier to install the necessary facilities to provide coverage, and if that carrier used GSM[6] technologies, then this customer will be impeded from accessing wireless services in this adjacent area altogether.

Given the diversity of the technologies used by wireless carriers, the standard adopted by the court of appeals would promote an infrastructure in which all carrier networks would have gaps in coverage in different geographic locations. Such a scenario would leave the consumer with no practical way of accessing wireless services while moving from one geographic area to another. Thus, the carrier serving this customer has been denied the ability to provide personal wireless services to its customer.

B. The Court of Appeals' Decision Undermines the Objectives of Promoting Competition and Innovation

Congress enacted the Telecommunications Act of 1996 "to promote competition and reduce regulation in order to secure lower prices and higher quality of services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." Pub. L. No. 104-104, 110 Stat. 56, 56 (1996). Dobson agrees with petitioner's argument that the effect of the Court of Appeals decision is anti-competitive. Moreover, Dobson submits that the decision obstructs not only Congress' general goal in the Telecommunications Act of encouraging the rapid deployment of new telecommunications technologies, but also undermines the clear intention, as expressed in the words of Section 332(c)(7)(B)(i)(II), that state and local authorities

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[6] Global System Mobile ("GSM") is a particular implementation of TDMA used widely throughout the world for wireless service; it is not interoperable with the other forms of digital technology that are common in the United States.

not be permitted to take any action that *has the effect of prohibiting* any form of wireless service.

As argued by petitioner, the court of appeals' decision favors wireless coverage by incumbent carriers. Meanwhile, newer carriers that are licensed to provide coverage in the same geographic area, and that bring with them new technologies for such enhancements as improved reception or advanced services, would be stripped of their rights to challenge local decisions that prohibit them from providing service in this area. Consequently, the new carrier may have significant gaps in coverage that it will not be able to fill. With significant gaps in coverage, this newer carrier would be less likely to succeed, or for that matter, to promote the use of the new technologies that it plans to offer. At the same time, the incumbent carrier, without a viable competitor, would have little incentive to upgrade its own technology or service offerings.

Congress was well aware of the fact that much of the United States already received wireless service in 1996 when the statutory provision was enacted; new licenses had recently been auctioned, however, and Congress was attentive to the new competitors' need for siting of facilities. Surely Congress did not intend by this provision to give local authorities *carte blanche* to block new entry. To the contrary, the only reason why this provision was needed at the time it became law was to facilitate the entry of new competitors. Reading the provision so that the mere presence of an incumbent's radio signal acts gives local regulators a justification for barring new competitors is simply inconsistent with the pro-competitive purposes of the Telecommunications Act.

The international community has been actively seeking to promote the migration of wireless services to third generation ("3G") wireless systems. 3G technology promises such capabilities as high speed Internet access, video and audio stream-

ing and location-based services such as services that would alert travelers of an event in a city they are visiting.[7] If the standard adopted by the Court of Appeals were allowed to stand, it would stymie the efforts by licensees seeking to install new facilities to accommodate 3G and other new technologies. Such an outcome will obstruct rather than promote the primary objective of the Telecommunications Act, as consumers might be unwilling to invest in subscriptions to newer service if the breadth of coverage by the newer carrier is less comprehensive than that of an incumbent.

CONCLUSION

For the foregoing reasons, Dobson respectfully requests that the Court grant the petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit filed by Omnipoint.

Respectfully submitted,

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[7] *See* CMRS *Competition Report* at *36-*37.

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IN THE SUPREME COURT OF THE UNITED STATES

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NEWTOWN TOWNSHIP
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THE ZONING HEARING BOARD OF NEWTOWN TOWNSHIP,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO FILE AND BRIEF *AMICI CURIAE* OF AT&T WIRELESS SERVICES, INC., NEXTEL COMMUNICATIONS, INC., AND SBC WIRELESS, INC. IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF

Pursuant to Rule 37.2 of the Rules of this Court, amici, AT&T Wireless Services, Inc., Nextel Communications, Inc., and SBC Wireless, Inc., respectfully move for leave to file the attached brief of amici curiae in support of the Petition for Writ of Certiorari. Petitioner Omnipoint Communications Enterprises, L.P., has consented to this filing. Respondents have denied consent. Amici have a substantial interest in securing a definitive and consistent interpretation of 47 U.S.C. § 332(c)(7)(B)(i)(II), the portion of the Telecommunications Act of 1996 which preempts actions of local officials which would have the effect of prohibiting the provision of personal wireless services.

Amici, through their subsidiaries and affiliates, are providers of personal wireless services to over 30 million subscribers nationwide. The provision of personal wireless services requires that each provider maintain an interlocking network of transceiver cells located no more than a few miles apart. At any given time amici, on a nationwide basis, are involved in thousands of applications before local land use boards to secure approval of the necessary facilities. The section of the TCA preempting decisions of such boards that would have the effect of prohibiting the provision of wireless services plays an important role in ensuring that such applications receive a fair hearing and that local concerns do not frustrate national telecommunications policy.

Amici submit that the decision of the Third Circuit in this case raises a significant and recurring issue regarding the proper interpretation of the prohibition of service provision. The courts of appeals and district courts are not in accord in their interpretations of this provision, and this uncertainty is

problematic to providers and local government entities. Moreover, the Third Circuit's standard eviscerates the statutory protection intended to be provided by the prohibition of service provision. In areas currently serviced by only one provider, the Third Circuit's standard will have the effect of prohibiting the provision of service to subscribers of all other providers, since, in general, subscribers of one provider cannot receive service through the facilities of another provider. It will also prevent competition, a key goal of the statutory and regulatory framework governing personal wireless services.

As a result, the issues presented in this case are of exceptional importance to amici and their millions of subscribers. Amici seek to promote a consistent interpretation of the prohibition of service provision that is faithful to the statute and consistent with federal telecommunications policy. Amici therefore respectfully seek leave of this Court to file the attached brief.

Respectfully submitted,

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INTEREST OF AMICI CURIAE

Amici curiae AT&T Wireless Services, Inc., Nextel Communications, Inc., and SBC Wireless, Inc., through their subsidiaries and affiliates, provide personal wireless services to over 30 million subscribers nationwide. The ongoing process of securing local approvals for the facilities necessary to provide service is a substantial undertaking, involving thousands of applications nationwide at any given time. At the present time there is no consensus on the proper interpretation of that portion of the Telecommunications Act of 1996 ("TCA") proscribing actions of local authorities that have the effect of prohibiting the provision of personal wireless services. 47 U.S.C. § 332 (c)(7)(B)(i)(II) (2000) (the "prohibition restriction"). This uncertainty greatly complicates the application process and subsequent judicial review of application denials.

Moreover, the standard adopted by the Third Circuit is contrary to federal telecommunications policy in that it permits local authorities to deny applications for personal wireless facilities so long as subscribers of one personal wireless provider can receive service. Denial of an application in such circumstances has the effect of prohibiting the provision of personal wireless services to subscribers of other providers. This standard, if permitted to stand, would be highly detrimental to the millions of subscribers of amici as well as the millions of subscribers of other providers.[1]

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[1] No counsel for any party in this case authored this brief in whole or in part, and no person or entity other than amici curiae and their members made any monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

In the TCA, Congress sought to preserve a role for local authorities in siting personal wireless facilities while ensuring that parochial interests would not frustrate national telecommunications policy. The prohibition restriction seeks to ensure that the ultimate question in land use proceedings is not whether services should be available but where the necessary facilities should be located. The lack of consensus on the proper interpretation of the prohibition restriction is problematic, as applicants and land use boards are uncertain as to the law governing review of decisions on applications for personal wireless facilities. Omnipoint Communications Enterprises, L.P.'s petition should be granted because the Third Circuit's decision turns on this important but unsettled question of federal telecommunications law.

The petition should also be granted because the standard adopted by the Third Circuit rests on the false premise that it is sufficient that one provider service an area. With rare exceptions, however, subscribers of one provider cannot receive service through the facilities of another provider. As a result, the standard permits the prohibition of service to subscribers of other providers so long as subscribers of one provider are able to receive service. This standard misinterprets the TCA to the detriment of the very consumers Congress sought to protect by ensuring the availability of service and promoting competition. It also frustrates the efforts of personal wireless providers to secure approvals for the facilities necessary to provide service to their subscribers. For the prohibition restriction to have any efficacy, it must be applied on a provider-by-provider basis.

ARGUMENT

The cellular telephone[2] has become a staple of American life. There are now almost 90 million personal wireless subscribers in the United States.[3] When the FCC made the decision in 1981 to license personal wireless services, it correctly foresaw its tremendous utility for personal and business use. To make the benefits of this technology available, the FCC made a policy decision to reallocate scarce space in the electromagnetic spectrum to provide the necessary radio frequencies. Reflecting a further policy decision that this technology could best be made available through market forces, the FCC allocated sufficient bandwidth to license multiple providers in each geographic area. In re Cellular Communications Sys., 86 F.C.C.2d 469, 474-482 (1981), reh'g denied, In re Advanced Mobile Phone Serv., Inc. North-West Telephone Co. & GTE Mobilenet of Milwaukee, Inc., 1986 WL 292526 (F.C.C. Jan. 6, 1986). These policy decisions were emphatically reaffirmed in the TCA, which reflects Congress' intent to promote competition and reduce regulation "in order to secure better prices and higher quality services for American telecommunications consumers and encourage rapid

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[2] The term "cellular" has both a generic and technical meaning. Generically, it refers to all forms of personal wireless services provided through an overlapping network of low-powered, short-ranged transceiver cells that reuse the same set of frequencies. Technically, "cellular" refers to the first type of such service licensed by the FCC. The FCC has since licensed other forms of personal wireless services, including Personal Communications Service (PCS) and Specialized Mobile Radio (SMR), which are functionally similar to cellular but have been assigned different operating frequencies.

[3] Fed. Communications Comm'n, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Serv., FCC 00-289, at 5-6 (2000).

deployment of new telecommunications technologies." Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

Despite the popularity of personal wireless services, however, providers soon encountered local opposition to the facilities necessary to provide service. Land use applications for such facilities were subject to interminable delays and denied for pretextual reasons. This situation threatened to thwart the development of the facility networks necessary for efficient utilization of the frequencies dedicated to personal wireless services. See H.R. Rep. No. 104-204, at 94, reprinted in 1996 Code Cong. & Admin. News, at 61.

In response, in the TCA, Congress preempted certain conduct on the part of local authorities considering applications for personal wireless facilities, and provided for denials of such applications to be reviewed in federal court. 47 U.S.C. § 332(c)(7)(B)(v). The TCA requires that applications for cellular facilities be resolved in a reasonable period of time. § 332(c)(7)(B)(ii). Denials cannot be based on the environmental effects of radio frequency emissions so long as the facility complies with emission regulations. § 332(c)(7)(B)(iv). Local authorities cannot unreasonably discriminate among providers of functionally equivalent services. § 332(c)(7)(B)(i)(I). Decisions denying an application must be in writing and supported by substantial evidence. § 332(c)(7)(B)(iii). The TCA further includes the prohibition restriction, which provides that: "the regulation of the placement, construction, and modification of personal wireless service facilities by any state or local government or instrumentality thereof-- ... shall not prohibit or have the effect of prohibiting the provision of personal wireless services." § 332(c)(7)(B)(i)(II).

In the TCA, Congress sought to preserve a role for local authorities in siting personal wireless facilities while ensuring that parochial interests would not frustrate national telecommunications policy. See H.R. No. 104-204, at 94, reprinted in 1996 Code Cong. & Admin. News, at 61 ("Such requirements will ensure an appropriate balance in policy and will speed deployment and the availability of competitive wireless telecommunications services which ultimately will provide consumers with lower costs as well as with a greater range and options for such services."). The prohibition restriction plays a key role in striking this balance. By mandating the availability of service, it seeks to ensure that the ultimate question in land use proceedings is not whether services should be available but where the necessary facilities should be located.

A. The Petition Should Be Granted to Remedy the Lack of Consistent Interpretation of the Prohibition Restriction.

Judicial interpretation of the prohibition restriction has been anything but consistent. The Fourth Circuit has applied a particularly restrictive interpretation, holding that an individual zoning decision could not violate the prohibition restriction, as in the Fourth Circuit's view the provision applies only to general bans or blanket prohibitions. AT&T Wireless PCS, Inc. v. City Council of Virginia Beach, 155 F.3d 423, 429 (4th Cir. 1998). Under this view, unless a local authority is impolitic enough to articulate an express ban on personal wireless facilities, the prohibition restriction becomes a dead letter. More recently, in 360 Degrees Communications Co. of Charlottesville v. Board of Supervisors of Albemarle County, 211 F.3d 79, 87 (4th Cir. 2000), another panel of the Fourth Circuit, while rejecting standards advanced by the Second and Third

Circuits, indicated in dicta that there might be egregious circumstances in which something less overt than an express ban might rise to the level of a prohibition.

The other circuits which have considered this issue have recognized that since regulation of land use occurs in the context of decisions on individual applications, the prohibition restriction should be given broader scope than provided in Virginia Beach. In Town of Amherst, N.H. v. Omnipoint Communications Enter., Inc., 173 F.3d 9 (1st Cir. 1999), the First Circuit acknowledged that an individual denial could violate the prohibition restriction if the circumstances demonstrated "such fixed hostility by the Board that one can conclude that further applications would be useless." Id. at 14. The Second Circuit also recognized the flaws inherent in the Virginia Beach interpretation, but approached the issue from a different perspective. Whereas the First Circuit approach looks to the totality of circumstances, including any history of other denials, the Second Circuit approach looks to the particulars of a specific application. In Sprint Spectrum, L.P. v. Willoth, 176 F.3d 630 (2d Cir. 1999), the Second Circuit recognized that if a proposed facility was the least intrusive means of filling a gap in service, it could be presumed that if such an application was denied, any other application would meet the same fate, making the denial an effective prohibition.

The Third Circuit addressed the prohibition issue in two opinions at the end of 1999. In Cellular Tel. Co. v. Zoning Bd. of Adj. of Ho-Ho-Kus, 197 F.3d 64 (3rd Cir. 1999), the Third Circuit adopted an approach that looks to the practical effect of the denial on subscribers of personal wireless services. It held that a gap exists when a subscriber using a hand-held phone is "unable either to connect with the land-based national telephone network or to maintain a

connection capable of supporting a reasonably uninterrupted communication." Id. at 70. Without defining all of the potentially relevant factors, the Third Circuit indicated that a gap would be significant where, due to its size and/or population density and/or traffic volume, the gap would impact a large number of subscribers. Id. at 70 n.2. It further held that the prohibition restriction would be violated if a local authority denied an application for the least intrusive means of filling a significant gap, based on findings made de novo by the reviewing court, without deference to the factfinding of the local authority. Id. at 71.

In APT Pittsburgh Ltd. P'ship v. Penn Township, 196 F.3d 469 (3rd Cir. 1999),[4] another panel of the Third Circuit applied the same basic interpretation of the prohibition restriction set forth in Ho-Ho-Kus, only to undermine its efficacy by engrafting upon it what is referred to in Omnipoint's petition as the "all carriers" standard. This standard requires that a provider challenging a denial on prohibition grounds must "include evidence that the area the new facility will serve is not already served by another provider." Id. at 480. In so doing, APT gave an expansive reading to dicta in Willoth, 176 F.3d at 643, suggesting that if one carrier provided sufficient coverage to an area (without any discussion of what was meant by "sufficient"), a prohibition claim might be available only to the first provider to enter that area. In the case that is the subject of the instant petition, Omnipoint Communications Enter., L.P. v. Newtown Township, 219 F.3d 240 (3rd Cir. 2000), a third panel of the Third Circuit applied the APT standard and held that a provider attempting to establish a prohibition must

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[4] While the opinion in APT Pittsburgh Ltd. P'ship v. Penn Township was filed eleven days prior to Cellular Tel. Co. v. Zoning Bd. Adj. of Ho-Ho-Kus, the APT decision refers to the Ho-Ho-Kus decision's holding on the prohibition point. See APT, 196 F.3d at 475.

show that the area the proposed facility would serve is not already served by another provider.

In sum, in the First Circuit, a prohibition is established through proof of circumstances that it is unlikely that any application would be approved. In the Second Circuit, the prohibition restriction is violated by the denial of an application for the least intrusive means to fill a significant gap, with a suggestion (without any definition of "significant" or "sufficiently"), that there must also be a showing that no other provider sufficiently covers that gap. The Third Circuit has adopted the basic Second Circuit least intrusive means/ significant gap approach and articulated factors defining what is a significant gap, but has engrafted on this the "all carriers" requirement. The Fourth Circuit has required proof of an express ban or policy, with a suggestion that in some egregious case something like the First Circuit's circumstances test might suffice.

In these and other circuits, there are decisions following Virginia Beach, Amherst, Willoth, Ho-Ho-Kus, and/or APT. See, e.g., Airtouch Cellular v. City of El Cajon, 83 F. Supp. 2d 1158, 1167-68 (S.D. Cal. 2000) (following APT); Cellular Tel. Co. v. Zoning Bd. of Adj. of Harrington Park, 90 F. Supp. 2d 557, 560-61 (D.N.J. 2000) (following Ho-Ho-Kus); Omnipoint Communications MB Operations, LLC v. Town of Lincoln, 107 F. Supp. 2d 108, 118 (D. Mass. 2000) (following Amherst and Ho-Ho-Kus); SNET Cellular, Inc. v. Angell, 99 F. Supp. 2d 190, 197 (D.R.I. 2000) (following Amherst); APT Minneapolis, Inc. v. Eau Claire County, 80 F. Supp. 2d 1014, 1025 (W.D. Wisc. 1999) (following Amherst); Bellsouth Mobility, Inc. v. Parish of Plaquemines, 40 F. Supp. 2d 372, 381 (E.D. La 1999) (following Virginia Beach); Nextel Partners of Upstate N.Y., Inc. v. Town of Canaan, 62 F.Supp. 2d 691, 697

(N.D.N.Y. 1999) (following Willoth); Sprint Spectrum, L.P. v. Board of County Commn'rs of Jefferson County, 59 F. Supp. 2d 1101, 1109 (D. Colo. 1999) (following Amherst). This confusion is not only problematic for TCA cases currently in litigation, but also for the thousands of applications currently before local land use boards. Given the importance of the issue and the confusion associated with it, the situation cries out for a definitive resolution.

B. The Petition Should Be Granted To Correct Erroneous Interpretation of A Key Statutory Provision.

The need for a definitive determination is even more acute because the standard adopted by the Third Circuit is wrong on the facts, wrong on the law, and directly in conflict with the policies underpinning the establishment of wireless service and articulated in the TCA itself. The facility networks of different providers in an area are not identical. This leads to inevitable situations where service is available to subscribers of one provider in areas that are significant gaps in the networks of other providers.[5] In such circumstances, the Third Circuit's standard denies the existence of a gap, on the assumption that the availability of service by one provider in that area is sufficient. This assumption ignores the fact that, except in very limited circumstances, subscribers of one provider cannot receive service through the facilities of another provider. As a result, the denial of an application in an area where only one provider has adequate coverage will result in the prohibition of service to subscribers of all other providers.

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[5] See In re Revision of Rules to Ensure Compatibility with Enhanced 911 ECS, 14 FCC Rcd. 10,954, ¶ 6 (June 9, 1999) (describing effects of gaps in a provider's network).

There are several technical reasons why subscribers of one provider cannot receive service through the facilities of another provider. First, providers operate on different frequencies. There are three functionally similar but technically different types of personal wireless service: cellular, PCS and SMR. In re Revision of E911 ECS, 14 FCC Rcd. 10,954, at ¶ 3. As a matter of federal policy favoring competition, in most areas there are competing providers for each type of service. Each type of service has been allocated a different frequency range, and each provider has been assigned different sets of channels within that range.

There are also differences between analog and digital service. Cellular providers initially utilized an analog format, although in some areas cellular providers now offer analog and digital service side-by-side. PCS and SMR are exclusively digital. Id. Analog-only phones (which are still in service) cannot process digital signals, and digital-only phones cannot process analog signals.

Finally, digital providers use a variety of incompatible formats for modulating their signals including GSM, CDMA, TDMA, and IDEN. Current phones programmed in one format cannot process signals transmitted in another. Id. at ¶ 35 n.47. For example, if Omnipoint uses a GSM format and Sprint uses a CDMA format, even though Omnipoint and Sprint are both PCS providers, their subscribers will not be able to receive service from each others' networks.

There are minor exceptions to the general rule that subscribers to one provider cannot receive service from the facilities of another. These exceptions prove the general rule

that one provider is insufficient to provide service to an area. In areas where there are two analog cellular providers (the "A" provider and the "B" provider), subscribers with the proper phones who know how to do so can, with difficulty, program their phones to receive the analog signal of either carrier.[6] This option results in substantial roaming charges in instances where the phone locks onto the signal of a provider other than the subscriber's provider. Even when it is possible to do so, using the facility of another provider generally requires initiating a new call, obtaining operator assistance and use of a credit card.

Not only is this practice cumbersome, it does not permit a subscriber to maintain a connection when moving between cells, an integral element of the definition of "service" utilized by both the Second and Third Circuit tests. See Ho-Ho-Kus, 197 F.3d at 70 (citing Willoth, 176 F.3d at 643). It is also limited to instances of a cellular subscriber accessing the analog signal of another cellular provider. It will not permit a cellular subscriber to receive digital cellular service from another cellular provider, or from a PCS or SMR provider, nor will it permit PCS or SMR subscribers to receive service from a cellular provider. In re Revision of 911 ECS, 14 FCC Rcd. 10,954, at ¶ 35.[7]

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[6] Overriding a phone's A/B programming in this manner is sufficiently impractical and cumbersome that the FCC has described the prospects of most subscribers doing so as theoretical. In re Revised E911 ECS, 14 FCC Rcd. 10,954, ¶ 21. To avoid unwanted roaming charges, most subscribers' phones are programmed in "A" only or "B" only mode. Id. at ¶¶ 21-26 (explaining need for special automatic routing of 911 calls between "A" and "B" providers).

[7] Using a "dual band" phone, it is possible for some PCS subscribers to receive service from certain cellular providers, but only if an intercarrier agreement is in place between the providers. Even in such circumstances, a subscriber will not be able to maintain a connection when moving between the PCS and cellular networks.

A second exception is limited to 911 calls. Analog cellular phones entering the market as of February 13, 2000, are required to automatically override an "A" only or "B" only setting to permit a 911 call. 47 C.F.R. § 22.921 (1999). This increases the chance of a 911 call going through in areas where the analog signal of a cellular subscriber's provider is not strong enough for reliable service. It is also intended to provide 911 service in circumstances in which, due to call volume, the subscriber's provider does not have a channel available to carry the 911 call.[8] In re Revised E911 ECS, 14 FCC Rcd. 10,954, at ¶ 44. Because this feature is limited to 911 calls made on new analog cellular phones, however, id. at ¶ 2, it would not benefit users in an area served only by a provider of digital personal wireless services. If, for example, the only provider in an area is an SMR carrier, application of the Third Circuit's standard would prohibit all cellular and PCS providers (and SMR providers using different modulation formats) from erecting the facilities necessary for their subscribers to receive 911 service.

Both Congress and the FCC have placed a premium on making 911 service available to all subscribers. See, e.g., Wireless Communications and Public Safety Act of 1999, Pub. L. No. 106-81, 113 Stat. 1286 (1999) (articulating public policy in favor of "the construction and operation of seamless, ubiquitous, and reliable telecommunications

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[8] Limiting an area to service by one provider would lead to capacity problems for that provider for both 911 and non-emergency calls, increasing the likelihood that even that provider's own subscribers will be blocked from receiving service. It would also be wasteful, as all but one set of the frequencies allocated for personal wireless service would go unused in such an area, in contravention of federal policies seeking to ensure efficient use of the electromagnetic spectrum. 47 U.S.C. § 301.

systems" as a means of providing 911 service); In the Matter of Revision of the Commission's Rules to Ensure Compatibility With Enhanced 911 Emergency Calling Sys., 12 F.C.C.R. 22,665 (1997); 47 C.F.R. § 20.18 (requiring all providers to process wireless 911 calls made on a phone compatible with the provider's radio frequency protocol and to provide Enhanced 911 call location services); In re Revised E911 ECS, 14 FCC Rcd. 10,954 (requiring automatic A/B access for 911 analog cellular calls). For this reason alone the Third Circuit's standard is problematic, as it is inconsistent with Congressional intent and the federal regulatory scheme. It is also a threat to public health and safety, as subscribers of the denied applicant will not have access to 911 service in the affected area.

The standard also directly conflicts with the prohibition restriction's focus "upon the end result to the consumers and their reception of uninterrupted wireless telephone service." Newtown Township, 219 F.3d at 244. The fact that service is available to subscribers of another provider is irrelevant to subscribers of the provider seeking to fill the gap. A subscriber of a provider without coverage in an area is "unable to connect with the land-based national telephone network or to maintain a connection capable of supporting a reasonably uninterrupted connection." Ho-Ho-Kus, 197 F.2d at 70 (defining elements of prohibition of service). The "end result" to the consumer is that he or she cannot use their phone. In this regard it is important to note that, as a practical matter, the prohibition restriction comes into play when a local decision not subject to challenge under other provisions of the TCA leaves a significant gap in a provider's network under circumstances in which it is reasonable to assume any other application to fill this gap will meet the same fate. If relief under the prohibition restriction is not available in these circumstances, no relief is

available. The applicant's subscribers must simply do without service in the affected area.

Congress could not have intended the prohibition restriction to be interpreted in a manner that would deem it sufficient that there be only one provider in an area.[9] State and local authorities have no authority to regulate market entry by providers of personal wireless services. 47 U.S.C. § 332(c)(3)(A). The federal regulatory scheme for personal wireless service has always rested upon the availability of multiple providers in each area. In establishing cellular service, the FCC considered and rejected licensing schemes in which one provider would be deemed to provide sufficient service to an area. In re Cellular Communication Sys., 86 F.C.C.2d at 471-72. It preempted state licensing schemes which might have the effect of finding a need for only one cellular carrier in an area, finding that "requiring demonstration of a general public need for cellular service could adversely affect our frequency allocation or delay the rapid implementation of cellular service, both of which are central elements of the federal design for cellular operations." Id. at 505. It also noted that "the inability of any cellular licensee to provide service could significantly

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[9] Section 253(a) of the TCA contains language, similar to the prohibition restriction, that prohibits State and local legal requirements that "may prohibit, or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." The FCC has, consistently, interpreted this language to "proscribe state and local legal requirements that prohibit all but one entity from providing telecommunications services in a particular state or locality." In the Matter of Silver Star Tel. Co., Inc. Petition for Preemption and Declaratory Ruling, 12 FCC 15639, ¶ 38 (1997). See also Public Util. Comm'n of Tex. et al., Petitions for Declaratory Ruling and/or Preemption of Certain Provisions of the Tex. Public Util. Regulatory Act of 1995, 13 FCC Rcd. 3460, 3480 ¶ 41 (1997) (section 253 prohibits state or local requirements that have the practical effect of prohibiting an entity from providing service).

inconvenience the public and cause a huge amount of spectrum to be unused." Id. at 502.

Reflecting this basic assumption that there would be multiple providers throughout a service area, the regulations governing cellular carriers provide that "[c]ellular system licensees must provide cellular mobile radiotelephone service upon request to all cellular subscribers in good standing, including roamers, while such subscribers are located within any portion of the authorized cellular geographic service area..." 47 C.F.R. § 22.901. (emphasis added). The FCC further reinforced this policy of multiple providers by subsequently taking sufficient bandwidth away from other uses to permit up to six PCS providers and at least one SMR provider per market area. See 47 C.F.R. § 24.1 (allocating bandwidth for PCS service); 47 C.F.R. § 90.661 (allocating bandwidth for SMR service). It did so out of a conviction that the then current availability of service from two providers was insufficient to provide the desired competition and availability of service. See In re Implementation of Section 6002(B) of ORBA 1993, 10 FCC Rcd. 8844, ¶ 4 (1995). See also H.R. Rep. 111, 103d Cong. 1st Sess. 261-62 (1993) (goal of amendments to 47 U.S.C. § 332(c) in Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title IV, § 6002(b), is to ensure "increased competition and subscriber choice" with respect to personal wireless services).

The assumption that it is sufficient that only one provider service an area is antithetical to the personal wireless regulatory scheme, which has consistently rejected the notion that one provider is sufficient. When it enacted the TCA in 1996, Congress can be presumed to have been familiar with this understanding of what was encompassed by "personal wireless services." Indeed, the regulatory

scheme is completely consistent with Congress' stated intent in enacting the TCA to secure better prices, higher quality services, and encourage rapid deployment of new telecommunications technologies by promoting competition and reducing regulation. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

The Third Circuit's holding that the prohibition restriction permits the prohibition of service to subscribers of other providers, so long as subscribers of one provider are able to receive service, misinterprets the statute. It does so to the detriment of the very consumers Congress was trying to protect. For the prohibition restriction to have any efficacy, it must be applied in a manner that permits each provider to erect the facilities necessary to provide service to its subscribers.

CONCLUSION

For the reasons set forth above, amici curiae AT&T Wireless Services, Inc., Nextel Communications, Inc. and SBC Wireless, Inc., respectfully request that the Petition for Writ of Certiorari of Omnipoint Communications Enterprises, L.P., be granted.

Respectfully submitted,

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No. 00-353

OCT 05 2000

IN THE

Supreme Court of the United States

OMNIPOINT COMMUNICATIONS ENTERPRISES, L.P.,
Petitioner,

v.

NEWTOWN TOWNSHIP
AND
THE ZONING HEARING BOARD OF NEWTOWN TOWNSHIP,
Respondents.

On Petition for Writ Of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF SPRINT SPECTRUM, L.P. IN SUPPORT OF PETITIONER

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Respondents.

On Petition for Writ Of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Sprint Spectrum, L.P. ("Sprint PCS") hereby respectfully moves, pursuant to Rule 37.2 of the Rules of this Court, for leave to file the attached brief as *amicus curiae*. Although Petitioner has consented to the filing of this brief, Respondents have not consented.

Sprint PCS provides high quality wireless telephony through a nationwide network utilizing state-of-the-art CDMA all-digital technology. To provide its customers with a seamless national network, Sprint PCS needs to build out a network of wireless infrastructure. The Telecommunications Act of 1996 ("the Act") limits the ability of local authorities to block construction of this infrastructure. Sprint PCS has been involved in substantial litigation concerning the

meaning of the Act and has an interest in ensuring that the federal courts correctly interpret the Act.

Sprint PCS believes that the attached brief will assist the Court in its consideration of this case. Although Sprint PCS shares an interest in a correct interpretation of the Act with other wireless providers, Sprint PCS has a unique perspective on this case. As the court below indicated, Sprint PCS's existing facilities enable it to serve its customers in the locality directly affected by the decision below. *See* Pet. App. at 10a. Accordingly, the decision below gives Sprint PCS an advantage in serving that locality. However, the attached brief explains how the need for seamless national wireless coverage makes such localized advantages illusory.

In addition, the decision below appears to rest on mistaken assumptions about wireless technology. In particular, the decision below appears to assume that wireless technology is fungible so that if a consumer using one technology can place a call, all wireless consumers can place a call. Sprint PCS is in a position to correct these mistaken assumptions.

For the foregoing reasons, Sprint PCS respectfully seeks leave to file the attached brief.

Respectfully submitted,

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INTEREST OF AMICUS CURIAE

Sprint Spectrum, L.P. ("Sprint PCS") provides high quality wireless telephony through a nationwide network utilizing state-of-the-art CDMA all-digital technology. To provide its customers with a seamless national network, Sprint PCS needs to build out a network of wireless infrastructure. The Telecommunications Act of 1996 ("the Act") limits the ability of local authorities to block construction of this infrastructure. Accordingly, Sprint PCS has an interest in ensuring that the federal courts correctly interpret the Act.

Although Sprint PCS shares this interest in a correct interpretation of the Act with other wireless providers, Sprint PCS has a unique perspective on this case. As the court below indicated, Sprint PCS has the capacity to serve its customers in the Newtown Township area through its existing facilities. *See* Pet. App. at 10a. Accordingly, the decision below gives Sprint PCS an advantage in Newtown. However, the market for wireless services is national, not local. As a result, Sprint PCS's interest in ensuring a correct interpretation of the Act nationwide transcends any benefit it might receive in Newtown. For this reason, Sprint PCS files this brief urging the Court to grant certiorari.[1]

SUMMARY OF ARGUMENT

The decision below conflicts with the law of other circuits and the letter and spirit of the Telecommunications Act of 1996. By granting preferential status to wireless carriers with existing facilities in specific localities, the decision below prevents new wireless carriers from building effective and competitive national wireless networks.

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[1] Petitioner has consented to the filing of this brief, but Respondents have not. No counsel for a party authored this brief in whole or in part, and no person or entity, other than *amicus curiae* and its counsel, made a monetary contribution to the preparation and submission of this brief.

The decision below conflicts with the law of other circuits not just in general approach, but on three distinct issues that are critical to the operation of the cellular siting provisions of § 704 of the Act. First, the circuits are split as to whether individual siting decisions, as opposed to general municipal policies, can "prohibit or have the effect of prohibiting the provision of personal wireless services." 47 U.S.C. § 332(c)(7)(B)(i)(II) ("the anti-prohibition provision"). Second, the circuits differ over the amount of discretion that local zoning officials retain under the Act. Third, the circuits are split as to whether the presence of a competitor providing service from existing facilities in a locality precludes a new entrant from demonstrating that a zoning decision has "the effect of prohibiting the provision" of wireless services. *Id.* By granting certiorari, this Court could resolve all three splits and establish a uniform national rule for a wireless industry that is nationwide in scope.

The decision below also conflicts with the text and purposes of the Act. The Act aims to promote competition and spur the deployment of new technologies (which, in turn, facilitate enhanced competition). However, by granting preferential status to existing wireless providers, the decision below protects a patchwork of local wireless monopolies using established technologies. The decision also permits local zoning officials to limit competition and decide how many competitors may serve a local community. The Third Circuit's approach cannot be squared with the text of the Act, which proscribes discrimination among carriers and local zoning decisions that "prohibit or have the effect of prohibiting the provision of personal wireless services." *Id.*

Finally, the circuit splits posed in Omnipoint's Petition merit expeditious consideration by this Court. Tolerance of divergent views among the circuits will frustrate the Act's objectives. The Third Circuit's decision stands as an obstacle to the development of seamless and competitive nationwide

wireless networks. Wireless providers cannot offer truly nationwide service if they cannot offer seamless service in Pennsylvania, New Jersey, and Delaware. This Court should grant certiorari to resolve the differing interpretations of § 704.

ARGUMENT

I. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS IN BOTH BROAD TERMS AND ON THREE SPECIFIC ISSUES

As Omnipoint demonstrates in its Petition (Pet. at 7-11), the circuits have taken a number of different approaches in interpreting the siting provisions in § 704 of the Act. However, a focus on the general approaches of the various circuits obscures the conflicting conclusions they have reached on a number of important and distinct issues raised by the siting provisions. Indeed, the circuits are split on three main issues, and Omnipoint's Petition provides a vehicle to resolve all three.

First, the circuits have split over whether an individual adverse siting determination can violate the statutory prohibition on zoning regulations that "prohibit or have the effect of prohibiting the provision of personal wireless services." 47 U.S.C. § 332(c)(7)(B)(i)(II). The Fourth Circuit initially took the position that a single adverse decision could not have the effect of prohibiting the provision of personal wireless services. *See AT&T Wireless PCS, Inc. v. City Council of the City of Virginia Beach*, 155 F.3d 423, 428-29 (4th Cir. 1998) (Luttig, J.). The Fourth Circuit held that the anti-prohibition protection of 47 U.S.C. § 332(c)(7)(B)(i)(II) "only applies to 'blanket prohibitions' and 'general bans or policies,' not to individual zoning decisions." *Id.* at 428 (quoting the district court opinion).

The First Circuit took a different view in *Town of Amherst v. Omnipoint Commun. Enters., Inc.*, 173 F.3d 9, 14 (1st Cir. 1999). In *Amherst*, the First Circuit recognized that an individual adverse zoning decision could reflect a broader policy prohibiting the siting of wireless infrastructure. *See id.* Although the First Circuit acknowledged the Fourth Circuit's contrary approach in *Virginia Beach*, it dismissed the difference as "more one of language than substance." *Id.* Presumably, this comment reflects the fact that although the First Circuit will examine an individual adverse determination for evidence of a general policy, it still requires a general policy of prohibition. The Fourth Circuit appeared to take a similar view in *360° Commun. Co. v. Board of Supervisors of Albemarle Cty.*, 211 F.3d 79, 86 (4th Cir. 2000). The court reaffirmed that "case-by-case denials of permits for particular sites cannot, without more, be construed as a denial of wireless service." *Id.* (citing *Virginia Beach*). Nonetheless, the court left open the possibility that an individual denial could evidence a general policy of prohibition. *See id.* at 86-87.

Whatever the exact degree of conflict between the First and Fourth Circuits, the Second Circuit clearly takes a different view. The Second Circuit rejected the Fourth Circuit's position as "untenable," in part because it "would essentially convert subsection B(i)(II) into a simple directive to consider applications on a case-by-case basis." *Sprint Spectrum, L.P. v. Willoth*, 176 F.3d 630, 640 (2d Cir. 1999). The Second Circuit also noted that: "Construing subsection B(i)(II) to apply only to general bans would lead to the conclusion that, in the absence of an explicit anti-tower policy, a court would have to wait for a series of denied applications before it could step in and force a local government to end its illegal boycott of personal wireless services." *Id.* at 640-41. Finally, the Second Circuit concluded that "[a]lthough attractively simple, such an interpretation is contrary to the TCA's intent to 'encourage the rapid deployment of new telecommunications

technologies.'" *Id.* at 641 (quoting *Reno v. American Civil Liberties Union*, 521 U.S. 844, 857-58 (1997)).

The Third Circuit appears to follow the Second Circuit on this issue and has observed that "local officials must always ensure that neither their general policies nor their individual decisions prohibit or have the effect of prohibiting personal wireless services." *Cellular Tel. Co. v. Zoning Bd. of Adjustment of the Borough of Ho-Ho-Kus*, 197 F.3d 64, 70 (3d Cir. 1999). Indeed, in the decision below, the Third Circuit took the extreme position that even a blanket prohibition on new cell sites would not violate the Act, as long as established providers are offering wireless service through existing facilities. *See* Pet. App. at 10a n.15. In other words, local officials do not violate the Act when they impose a blanket ban on new services and protect existing providers. Accordingly, while the Fourth Circuit analyzes general bans to the exclusion of individual zoning decisions, the Third Circuit appears to analyze individual decisions to the exclusion of general bans.

Second, the circuits differ on the broader question of the extent to which the Act restricts the authority of local zoning officials. The siting provisions of the Act represent a "refreshing experiment in federalism." *Amherst*, 173 F.3d at 17. The Act expresses the strong federal interest in deploying wireless technology, while respecting the traditional role local authorities have played in zoning decisions. Rather than having the strong federal interest simply override the local role, as initially proposed, Congress allowed municipalities to retain local authority over zoning decisions provided those decisions comply with federal law, including the requirement that local regulations not have the effect of prohibiting personal wireless services. The circuits differ over what authority the Act preserves for local zoning officials.

The Fourth Circuit treats the authority of local zoning authorities as largely unchanged by the Act. In *Virginia*

Beach, for example, the Fourth Circuit limited the application of § 704's anti-prohibition provision to general policies and blanket bans because the contrary view "would effectively nullify local authority." 155 F.3d at 428; *see also id.* at 429 (noting that the Fourth Circuit rule "is necessary to avoid destroying local authority"). A subsequent panel of the Fourth Circuit went even further and suggested that a strict interpretation of § 704's requirement that local zoning authorities make their decisions in writing based on substantial evidence, 47 U.S.C. § 332(c)(7)(B)(iii), "might well even invite Tenth Amendment scrutiny." *AT&T Wireless PCS, Inc. v. Winston-Salem Zoning Bd. of Adjustment*, 172 F.3d 307, 313 (4th Cir. 1999). Indeed, Judge Niemeyer, writing only for himself, found that provision incompatible with the Tenth Amendment. *See Petersburg Cellular Partnership v. Board of Supervisors of Nottoway Cty.*, 205 F.3d 688, 705 (4th Cir. 2000).

The Second Circuit (and to a lesser extent the Third Circuit), by contrast, emphasize the strong federal interest in deploying wireless technology. *See, e.g.*, *Willoth*, 176 F.3d at 644 ("The TCA imposes limits on the authority of state and local governments to restrict personal wireless services."). As a result, while acknowledging that the Act preserves a role for local authorities, these courts have construed that role as much more limited. Although local zoning boards retain the authority to direct cellular companies to a feasible site that minimizes interference with local interests, "local governments must allow service providers to fill gaps in the ability of wireless telephones to have access to land-lines." *Id.* at 643; *accord APT Pittsburgh L.P. v. Penn Township*, 196 F.3d 469, 479 (3d Cir. 1999). In other words, local zoning officials lack authority to deny access to a necessary site, and retain authority only to direct a provider to a specific sufficient site, if more than one site suffices.

In a recent decision, the Fourth Circuit expressly and categorically rejected this analysis. *See 360° Commun.*, 211 F.3d at 87. The Fourth Circuit dismissed this view as inconsistent with the Act and as erroneously "shifting the burden of production to the local government to explain its reason for denying such an application." *Id.*

The split of authority on this question reflects broad disagreement over the extent to which the Act limits local zoning authority. Continued disharmony and uncertainty about the authority of local officials will result in significant federal-court litigation to review the actions of local zoning authorities. This litigation creates unnecessary friction and threatens to undermine the Act's "refreshing experiment in federalism." This Court should grant certiorari to eliminate this friction and fix the meaning of the Act.

Third, and finally, there is a split of authority between the Second and Third Circuits over whether § 704's anti-prohibition provision applies when another service provider already offers service in the area. In *APT*, the Third Circuit adopted a novel and mischievous rule that effectively reads § 704's anti-prohibition provision out of the statute whenever another carrier already provides service in an area. *See* 196 F.3d at 480. Specifically, *APT* held that "[t]he provider's showing on this issue will thus have to include evidence that the area that the new facility will serve is not already served by another provider." *Id.* Such a test clearly undermines competition. The decision below quoted this language and remanded the case solely for application of this new test. *See* Pet. App. at 9a; *see also* Pet. App. at 10a ("The question then remains as to whether other providers already serve the area at issue in this case.").

Although the Third Circuit purported to build its analysis on that of the Second Circuit in *Willoth*, the Third Circuit in fact created a split over whether another provider's existing service in an area precludes a violation of § 704's anti-

prohibition provision. In *Willoth*, an analog cellular carrier, Frontier Corporation, already served the area that Sprint PCS sought to serve through the installation of new facilities. *See* 176 F.3d at 638-39 (discussing Frontier). Nonetheless, *Willoth* expressly rejected the municipality's argument that "its earlier approval of Frontier's application and professed willingness to accept some level of PCS service" defeated Sprint PCS's claim. *Id.* at 640. The Second Circuit also rejected as "untenable" the "result that once personal wireless services are available somewhere within the jurisdiction of a state or local government, whether by virtue of a facility located outside or inside its borders, the state or local government could deny any further actions with impunity." *Id.* at 641.[2]

This case provides an ideal vehicle for resolving all three of these circuit splits. This case allows this Court to determine the scope of § 704's anti-prohibition provision (whether it covers blanket policies, individual determinations, or both) and the extent of the authority retained by local zoning officials under the Act. This Court also can resolve the question whether the presence of an existing carrier in a locality precludes a violation of § 704's anti-prohibition provision. This case provides a vehicle to address all three questions and to give invaluable guidance for numerous wireless providers and countless municipalities across the country.

---

[2] To be sure, the Second Circuit observed that "once an area is sufficiently serviced by a wireless service provider, the right to deny applications becomes broader." *Id.* at 643. However, in light of the observations quoted above and its treatment of Frontier, the Second Circuit's use of the phrase "sufficiently serviced" cannot be read to mean simply the presence of one pre-existing carrier. The Third Circuit's decisions in this case and *APT*, however, make just this error in interpreting *Willoth*.

II. THE DECISION BELOW UNDERMINES THE CORE PURPOSES OF THE ACT AND THE SPECIFIC PROVISIONS ADDRESSING LOCAL ZONING AUTHORITY

The decision below threatens to deny consumers the benefits of competition and innovative technology promised by the Telecommunications Act. The decision thwarts these goals by enabling local zoning boards to deny competitive entry by new wireless providers as long as some consumers already are able either to "connect with the land-based national telephone network, or to maintain a connection capable of supporting a reasonably uninterrupted network." Pet. App. at 10a (quoting *Ho-Ho-Kus*, 197 F.3d at 70). This result conflicts with the Act's overall purposes and the intent of the specific provisions addressing the siting of wireless facilities.

A. The Decision Below Contradicts the Act's Overriding Pro-Competitive Purpose.

The Third Circuit's decision stymies competition rather than encouraging it by creating a barrier to the entry of competitive wireless providers. The Act heralded a sea change in the structure of the telecommunications industry. With the passage of the Act, consumers no longer would remain beholden to local telephone monopolies. The Act replaced monopolies with competition that would lead to the introduction of innovative technology, which, in turn, would unleash further competition. As its preamble makes clear, the Act aims "[t]o promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." Pub. L. No. 104-104, 110 Stat. 56, preamble (1996).

Moreover, as numerous courts have recognized, the Act's legislative history underscores these stated goals. Congress

designed the Act "to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced . . . technologies and services . . . by opening all telecommunications markets to competition . . . ." H.R. Conf. Rep. No. 104-458, at 113 (1996), *reprinted in* 1996 U.S.C.C.A.N. 124, 124 (quoted with ellipses in *Willoth*, 176 F.3d at 637). Indeed, this Court recognized in *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999), that Congress crafted the Act to replace "the longstanding regime of state-sanctioned monopolies" with a competitive market structure. "States [could] no longer enforce laws that impede competition . . . ." *Id.*

Congress viewed the Act as landmark legislation designed to revolutionize the telecommunications industry. "The [Act] is expansive legislation designed primarily to increase competition in the telecommunications industry." *BellSouth Mobility, Inc. v. Gwinnett Cty.*, 944 F. Supp. 923, 927 (N.D. Ga. 1996); *see also AT&T Commun. Sys. v. Pacific Bell*, 203 F.3d 1183, 1184 (9th Cir. 2000); *U.S. West Commun. v. MFS Intelenet, Inc.*, 193 F.3d 1112, 1116 (9th Cir. 1999). The Act "is critically important because it unleashes a digital free-for-all [which] takes down the barriers of local and long distance and cable company and satellite, computer, software entry into any business they want to get in. Once and for all, all regulations are taken down." Cong. Rec. H1151 (Feb. 1, 1996) (statement of Rep. Markey).

The President articulated a similar view of the importance of the Act in his signing statement. He observed that the telecommunications "revolution has been held back by outdated laws designed for a time when there was one phone company, three TV networks, no such thing as a personal computer. Today, with the stroke of a pen, our laws will catch up with our future. We will help to create an open marketplace where competition and innovation can move as

quick as light." The White House: Remarks by the President in Signing Ceremony for the Telecommunications Act Conference Report, FDCH Federal Department and Agency Documents (Feb. 8, 1996).

The decision below frustrates these congressional and presidential objectives and returns wireless markets back to "outdated laws, designed for a time when there was one phone company." The decision simultaneously undermines the Act's twin goals of promoting competition and innovation. The decision converts a pro-competitive law into an obstacle to competition. Under the Third Circuit's view, the Act limits local authority only when "the area the new facility will serve is not already served by another provider." Pet. App. at 9a (quoting *APT*, 196 F.3d at 480). In other words, local authorities may deny a new entrant's request to build a wireless facility whenever the new facility would provide competition, and the Act constrains local officials only when a carrier is seeking to become the first and only provider in a previously unserved area. This interpretation cannot be squared with the Act's pro-competitive orientation.

Indeed, the Third Circuit's one-carrier-serves-all rule squarely conflicts with the Act's overall approach to wireless service. Before the mid-1990's, the wireless market was essentially a regulated duopoly in which two carriers were assigned spectrum to provide cellular service to consumers in an area. Historically, one of the carriers was the incumbent local exchange provider (*e.g.*, the Bell Operating Companies) with AT&T/McCaw Cellular often providing the alternative. In light of their government-conferred duopoly, these wireless carriers operated under a number of constraints.

In 1995 and 1996, the FCC, the courts, and Congress began to remove these restrictions. In 1995, the FCC allocated additional spectrum for the provision of PCS telephone service. That same year, the court with jurisdiction over the AT&T consent decree waived the decree's long-distance

prohibition under certain conditions. *See United States v. Western Elec. Co.*, 890 F. Supp. 1, 7-9 (D.D.C. 1995). The Act removed most of the remaining constraints on wireless carriers. *See* 47 U.S.C. §§ 271(b)(3) (creating an exception to interLATA prohibitions); 332(c)(8) (removing general equal access obligations for all commercial mobile radio service providers); 332(c)(7)(B) (precluding state - and local governments from prohibiting the deployment of competitive wireless services).

At the same time that the courts and Congress were removing these constraints, Congress was opening up the wireless market to competition. During 1995 and 1996, the government auctioned bandwidth spectrum and wireless licenses, and private carriers built new wireless systems (PCS and SMR). These developments transformed a duopoly into a competitive market. Within two years, consumers began to enjoy the benefits of this increased competition: significant decreases in the price of wireless service, offers of minutes to be used for any type of call (*i.e.*, local or long distance), and wireless Internet access.

Sprint was one of these new entrants. Beginning in 1995, Sprint acquired new broadband PCS licenses (for which it paid the United States nearly $3 billion) to provide wireless services in all 50 states, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands. Although it commenced service only three years ago, Sprint PCS already serves over eight million customers and its state-of-the-art, CDMA, all-digital network covers the majority of the nation's metropolitan areas, including more than 4,000 cities and communities across the country.

The decision below reintroduces the bad old days of the wireless duopoly, or perhaps worse. Under the Third Circuit's analysis, if one provider already serves a market through existing facilities, local authorities can block any new entry. Local authorities have *carte blanche* under the Third

Circuit's opinion to set whatever level of competition they see fit. In many communities, the decision below will have the effect of enshrining the old duopoly carriers, although those carriers will now operate without the regulatory constraints that previously limited their ability to exploit their market power. Moreover, in some communities, where only one carrier has established facilities, the Third Circuit's regime will preclude all competition and give a carrier with existing facilities an unregulated monopoly over wireless service.[3]

The Third Circuit's one-carrier-serves-all rule also reflects a fundamental misunderstanding of wireless technology. Consumers currently can choose from a number of competing technologies that are not interchangeable or compatible. For example, a consumer using Sprint PCS's CDMA digital technology cannot utilize analog infrastructure to place or receive calls, unless the consumer happens to have a dual-mode (analog/digital) telephone. Accordingly, the availability of analog service employing existing analog infrastructure in a locality makes no practical difference to a consumer with a single-mode CDMA telephone. Although the Third Circuit purported to consider the availability of service from the perspective of the end-user, *see* Pet. App. at 10a, its failure to understand wireless technology leaves many end-users without effective service.

The decision below not only fails to understand wireless technology, it also affirmatively undermines the Act's intent to "encourage the rapid deployment of new

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[3] The potential ability of other carriers to pay for access to the monopoly facilities does not eliminate this threat to competition. In some cases, the carrier with an effective local monopoly will employ outdated technology that will not allow other carriers' customers to complete a call. But even where technology does not present insuperable obstacles, access charges allow the local monopolist to extract monopoly rents from all customers in violation of the evident purpose of the Act.

telecommunications technologies." Pub. L. No. 104-104, 110 Stat. 56, preamble (1996). By eliminating the Act's protection in localities already served by another provider, the Third Circuit entrenches incumbent wireless carriers. In the rapidly developing wireless market, protecting the incumbent means favoring outmoded technologies, such as analog cellular. As technology continues to develop, the decision below will continue to disadvantage innovative technologies and artificially extend the life of outdated technologies that have little to offer besides existing tower space.[4]

B. The Decision Below Undermines the Specific Provisions Directed at Siting Issues and Local Zoning Authority.

Section 704 of the Act specifically addresses wireless siting issues and expresses the strong federal interest in ensuring the deployment of competitive wireless services. As the Second Circuit observed in *Willoth*, Congress enacted § 704 "[i]n furtherance of" the Act's overall goals of promoting competition and the rapid deployment of advanced technologies. 176 F.3d at 637; *see also Petersburg Cellular*, 205 F.3d at 697 (Niemeyer, J.) ("The Telecommunications Act of 1996 seeks to promote a more efficient wireless communications system for consumers, and to this end, it facilitates the construction of communications facilities.").

"Although the TCA 'does not completely preempt the authority of state and local governments to make decisions

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[4] It is no answer to suggest that local authorities will not allow inefficient monopolies because local residents would bear the brunt of inefficient service and monopoly prices. The whole theory underlying the Act's partial pre-emption of local zoning authority is that while local residents bear the full cost associated with any new facilities, they do not enjoy the full benefits of enhanced wireless services, which they share with cellular users who have no voice in local affairs. Section 704 corrects this imbalance, while the Third Circuit's decision exacerbates it.

regarding the placement of wireless communications service facilities within their borders,' it does impose significant limitations on this authority.'" *Sprint Spectrum L.P. v. Town of Easton*, 982 F. Supp. 47, 49 (D. Mass. 1997) (quoting *BellSouth Mobility*, 944 F. Supp. at 927). In particular, the Act forbids discrimination in the zoning process among wireless carriers, 47 U.S.C. § 332(c)(7)(B)(i)(I), requires local authorities to expedite wireless siting applications, 47 U.S.C. § 332(c)(7)(B)(ii), and requires local authorities to make their decisions in writing based on substantial evidence in the record, 47 U.S.C. § 332(c)(7)(B)(iii). In addition, and of particular relevance here, the Act commands that local siting decisions "shall not prohibit or have the effect of prohibiting the provision of personal wireless services." 47 U.S.C. § 332(c)(7)(B)(i)(II).

The Third Circuit's misguided view cannot be reconciled with these statutory provisions. By allowing municipalities to block the construction of any new facilities as long as some infrastructure exists, the Third Circuit effectively prohibits the provision of competitive personal wireless services, even though Congress already determined that competition should remain open. Moreover, by granting preferential status to a wireless carrier with existing installed facilities, the Third Circuit ironically authorizes the very discrimination among carriers that the immediately preceding subsection of the Act forbids. Finally, by granting blanket authority to block the construction of new infrastructure as long as existing facilities are in place, the Third Circuit undermines the Act's requirement that local authorities justify individual zoning decisions on a case-by-case basis, in writing, and based on record evidence.

The Third Circuit's one-carrier-serves-all regime also conflicts with Congress' intent in enacting § 704. That section "effects substantive changes to the local zoning process . . . by preempting any local regulations, including

zoning regulations, which conflict with its provisions." *SBA Commun., Inc. v. Zoning Comm'n of Town of Brookfield*, No. 3:00CV006-GLG, 2000 WL 1276834, at *3 (D. Conn. Sept. 6, 2000) (citing *Easton*, 982 F. Supp. at 50). Congress found that "[s]tate and local requirements, siting and zoning decisions" had "created an inconsistent and, at times, conflicting patchwork of requirements" that was "inhibit[ing] the deployment" of wireless communications services. H.R. Rep. No. 104-204, at 94 (1995), *reprinted in* 1996 U.S.C.C.A.N. 10, 61.

The Third Circuit ignores these strong federal interests and virtually guarantees a patchwork system of inefficient wireless service. The decision below gives local authorities a trump card that allows them to disregard all these federal interests as long as some carrier is providing service from existing facilities. Sprint PCS, like Omnipoint, AT&T, and others, depends on tower siting to build out its network so that consumers can enjoy Sprint PCS's state-of-the-art wireless services wherever they travel. If local authorities can bloek the construction of new infrastructure by pointing to a provider of antiquated analog cellular service, the Act will fail to achieve its two principal goals. In short, the decision below returns wireless service to the bad old days of duopoly and consigns consumers to yesterday's technology.

III. THE ISSUES RAISED BY THE DECISION BELOW MERIT THIS COURT'S IMMEDIATE ATTENTION

The circuit splits posed in Omnipoint's Petition, and developed *supra* at 3-8, merit expeditious consideration. Unlike some areas of the law where such splits can "percolate" for several years as the lower courts strive for consensus, the issues presented in this case require immediate resolution. Indeed, this Court twice has granted certiorari to review important issues under the Telecommunications Act

even in the absence of a circuit split. *See GTE Service Corp. v. FCC*, 120 S. Ct. 2214 (2000); *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999).

The wireless industry has become a truly national industry. Consumers demand a service that allows them to place and receive calls when they get off an airplane or travel on an interstate highway. They do not want to have to carry a separate telephone employing outdated technology just so they can make calls in a locality that has blocked the deployment of sophisticated wireless technology.

To satisfy consumer demand, Sprint PCS and its competitors must develop seamless nationwide wireless networks. The Telecommunications Act recognizes the important federal interest in the establishment of these networks, and limits local authority to prevent this development. The Act cannot accomplish this goal if disparate interpretations of § 704 are allowed to stand. Nationwide networks cannot be built if the Third Circuit maintains an interpretation of the Act at variance with the text and the views of its sister circuits. National wireless carriers cannot offer seamless nationwide service if they cannot build adequate facilities in Pennsylvania, New Jersey, and Delaware.

The Act recognizes that the siting provisions demand expedition to function. Subsection B(v) allows carriers to challenge "any final action or failure to act" and requires the courts to "hear and decide such action[s] on an expedited basis." 47 U.S.C. § 332(c)(7)(B)(v). In addition, a number of courts have recognized the need for expedition in ensuring that local zoning officials do not use procedural obstacles to impose a de facto prohibition on the construction of wireless facilities. *See, e.g., Amherst*, 173 F.3d at 17 & n.8. This Court will further the Act's interest in expedition by definitively resolving the issues raised in Omnipoint's Petition.

Finally, it bears emphasis that by granting certiorari this Court can eliminate unnecessary friction between state and local governments and the federal courts. As noted, § 704 embodies a unique and "refreshing experiment in federalism." *Id.* at 17. Section 704 authorizes federal courts to review the decisions of local zoning boards as if they were decisions from federal agencies. Uncertainty exacerbates the inevitable friction between the federal courts and local authorities. This Court can minimize that friction by fixing the meaning of the Act. In sum, this Court should grant certiorari now to resolve the differing interpretations of the siting provisions, without waiting for further percolation in the lower courts.

CONCLUSION

For the foregoing reasons, and those expressed in Omnipoint's Petition, this Court should grant Omnipoint's Petition for certiorari.

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IN THE

Supreme Court of the United States

OMNIPOINT COMMUNICATIONS ENTERPRISES, L.P.,
Petitioner,

—v.—

NEWTOWN TOWNSHIP AND
THE ZONING HEARING BOARD OF NEWTOWN TOWNSHIP,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

Petitioner, Omnipoint Communications Enterprises, L.P. ("Omnipoint"),[1] submits this reply brief to correct certain inaccuracies within the Brief of Respondents in Opposition to Petition for Writ of Certiorari ("Respondents' Brief").

For the convenience of the Court, each section of Respondents' Brief will be addressed in turn. However, it is important to note at the outset that the purported factual issues raised by respondents had nothing to do with the court of appeals' decision. The sole basis for reversal was the "all carriers" requirement imposed by APT Pittsburgh Ltd. P'ship v. Penn Township, 196 F.3d 469 (3d Cir. 1999). As explained below, respondents' contentions about alternative sites are unsupported and untrue. But more importantly, they have no bearing on the suitability of this case for review. See section 4 below.

1. Telecommunications Facilities Are Not Permitted Anywhere Within the Township.

In their Counter-Statement of the Case and Introduction, respondents boldly assert, without any support, that telecommunications facilities are allowed at several locations within the Township, "including two light industrial zoning districts and a special use (SU2) district." Respondents' Brief at 4. That is just plain wrong, as demonstrated by the record and the district court's findings.

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[1] The Corporate Disclosure Statement included within Omnipoint's Petition for Writ of Certiorari is incorporated herein by reference.

Due to a combination of use and height restrictions, telecommunications facilities are not allowed *anywhere* in Newtown Township. See Omnipoint Communications Enter., L.P. v. Newtown Township, No. 98-CV-5171, 1999 WL 269936, at *4 (E.D. Pa. Apr. 29, 1999) ("Newtown I") ("Plaintiff is therefore precluded from placing the antennas that it needs to provide coverage anywhere within the Township.") (App. 23a).

It was stipulated at the zoning hearing that such facilities "might possibly" be a permitted use *only* in a light industrial district, which would be the case only if they were deemed to be the equivalent of a "microwave tower" (a dubious assumption, at best).[2] See Newtown Township, Pa., Zoning Code § 172-82 (Jan. 6, 1997) ("Zoning Code") (App. 60a). Moreover, the only light industrial district where the antennas would be capable of providing the required service was unavailable, because a single entity owned the entire district and was unwilling even to discuss the possibility of entering into a lease with Omnipoint given the Township's reservation of the right to use the land for a highway bypass. See Newtown I at *4 (App. 23a).

More importantly, even if telecommunications facilities were a permitted use in the light industrial district and the property were available, the zoning ordinance still

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[2] Despite respondents' naked assertions to the contrary, there was no evidence that the facility would be allowed in a "special use" district. See Newtown I at *4 ("There was no testimony indicating that the antennas were permissible within the Special Use districts and no testimony regarding what property was located within these districts.") (App. 23a). If there were any such evidence, respondents were required to submit it in opposition to Omnipoint's motion for summary judgment. See Fed. R. Civ. P. 56(e). Their failure to do so speaks volumes.

would bar an installation there, because the antennas would have to be mounted on a freestanding tower that would exceed the ordinance's height limitation. See Zoning Code § 172-83.C (prohibiting any "building" more than 45 feet tall) (App. 62a); Zoning Code § 172-1 (defining "building" to include any "structure") (App. 58a).

Accordingly, the district court correctly found that the Zoning Code does not allow telecommunications facilities anywhere within Newtown Township. See Newtown I at *4 (App. 22a). The record below could not support any other conclusion.

2. The Conflict Is Real.

Respondents also contend that the conflict among the circuits is illusory. In essence, they attempt to reconcile the cases by arguing that the fourth circuit's "general ban" rule applies to cases of *per se* prohibition and the third circuit's "significant gap" rule applies to all others.

That ignores the fact that the fourth circuit disagrees with the significant gap approach and the third circuit disagrees with the general ban approach. Neither court will use the other's approach under any circumstances. See 360 degrees Communications Co. of Charlottesville v. Board of Supervisors of Albemarle County, 211 F.3d 79, 87 (4th Cir. 2000) (flatly rejecting the significant gap analysis); Omnipoint Communications Enter., L.P. v. Newtown Township, 219 F.3d 240, 244 n.3 (3d Cir. 2000) (holding that the prohibition of sites everywhere was "unavailing") (App. 10a).

The third and fourth circuits' approaches are irreconcilable, because they would lead to different results

when applied to the same facts. Indeed, they would lead to different outcomes in this very case. Because the zoning ordinance here does not allow telecommunications facilities anywhere within Newtown Township, it is a "general ban" and would violate the Telecommunications Act[3] under the fourth circuit's test. Nevertheless, the third circuit held that the ordinance cannot be found violative of the Act unless all other carriers also are without service in the same area.[4]

It also is inaccurate to suggest that the second and third circuits would reach the same result. As ably explained in the proposed *amicus* brief filed by Sprint Spectrum L.P., the second circuit did not impose the "all carriers" requirement in Sprint Spectrum L.P. v. Willoth, 176 F.3d 630 (2d Cir. 1999). In fact, it did just the opposite, by holding that the municipality's previous approval of another carrier's application to serve the same area was not sufficient to defeat Sprint's prohibition claim. Id. at 640. Under the second circuit's approach, the district court's decision here would have been upheld, because Omnipoint has been

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[3] 47 U.S.C. § 332(c)(7)(B)(i)(II).

[4] It is quite possible that other carriers may have service in Newtown Township notwithstanding the general ban. For example, the original cellular carriers may be able to reach the area from outside the township because analog technology works over longer distances. In addition, other digital carriers appear to have installed facilities in violation of the ordinance. See Newtown I at *4 ("The fact that the Township has looked the other way in the placement of these antennas does not alleviate the fact that according to its ordinance, the use is not permitted.") (App. 22a).

precluded from filling a significant gap by the least intrusive means.[5]

Nor is the first circuit in full accord with the fourth. The first circuit would be much more apt to consider evidence that further applications would be futile. See Town of Amherst, N.H. v. Omnipoint Communications Enter., Inc., 173 F.3d 9 (1st Cir. 1999).

In short, the conflicting standards applied by the first, second, third and fourth circuits produce different outcomes in a variety of common circumstances, including those presented by this case. That has created an urgent need for Supreme Court intervention.

3. The Third Circuit's Decision Is Anti-Competitive.

Respondents also argue that the third circuit's approach is not anti-competitive because carriers could all use each other's facilities if they would just standardize the technology. Of course, that ignores the fact that each carrier is licensed to operate within a unique range of frequencies.

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[5] The antennas were to be installed on the roof of a six-story building inside an inconspicuous fiberglass canister that was only 5½ feet tall and 18 inches wide. It is difficult to imagine any installation less intrusive than that, and none have been proffered.

In addition, it should be noted that Willoth borrowed the "least intrusive means" concept from New York's state zoning law. That should not have been "federalized" because it is inconsistent with state law in other jurisdictions. Congress meant to leave state zoning law alone, except to the extent it prohibits service or otherwise violates the Act.

Even if all other carriers used GSM[6] technology like Omnipoint, each carrier would still need its own network tuned to its own frequency range.[7] Even more importantly, standardization would end competitive innovation, which is one of the Act's principal goals.

4. This Case Is Ideally Suited for Review.

The court of appeals' decision in this case was based entirely upon the "all carriers" requirement. See Newtown at 245 ("we must return this matter to the District Court for the application of the appropriate standard.") (App. 11a). The "all carriers" requirement is in direct conflict with the standards applied by several other courts of appeals (which also conflict with each other). That makes this case an ideal vehicle for addressing the circuit splits and clarifying the applicable standard for prohibition claims.

Respondents attempt to obscure that irrefutable point by arguing an inaccurate version of immaterial facts.

For example, respondents argue at length that other locations could have been used instead of Newtown Towers. Omnipoint proved at the zoning hearing that those locations would not be capable of providing the required service, but none of that matters because the installation would not be

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[6] GSM is the acronym for Groupe Speciale Mobile (or Global Standard for Mobile communications), which is the internationally prevalent standard.

[7] Licensing multiple providers for the same frequency range has been rejected by the FCC as unworkable. See An Inquiry Into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems, 86 F.C.C.2d 469, 477-78 (1981).

allowed at any of them anyway. See Newtown I at *4 (App. 23a).

Respondents also contend that Omnipoint "has never argued that it was discriminated against vis-a-vis other carriers." Respondent's Brief at 15. That also is untrue. Omnipoint asserted a discrimination claim, but it was denied by the district court because respondents treated another carrier just as badly as Omnipoint.[8] See Newtown I at *3 (App. 20a).

Let us not forget that the district court granted a summary judgment in Omnipoint's favor because the facts about which there was no genuine dispute entitled Omnipoint to a judgment as a matter of law. See Newtown I (App. 15a); Fed. R. Civ. P. 56. That ruling was not disturbed by the court of appeals for any purpose other than application of the new "all carriers" requirement. If this Court concludes that the court of appeals was wrong to impose that requirement, the district court's decision in Omnipoint's favor can simply be affirmed. If, instead, this Court agrees with the court of appeals or imposes some other new standard, the case can be remanded for further proceedings consistent with the Court's opinion. There is nothing unusual about those options that would make this case unsuitable for Supreme Court review.

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[8] This shows why the anti-discrimination provision of the Act is no substitute for the anti-prohibition provision, as the third circuit seems to have believed. See APT at 480 n.8 (3d Cir. 1999) ("even if the area to be served is already served by another provider, the TCA may invalidate the denial of a variance if it has the effect of unreasonably discriminating between providers").

5. The Third Circuit's Approach Frustrates the Recent Public Safety Legislation.

Respondents also contend that the Wireless Communications and Public Safety Act of 1999 ("Public Safety Act"), Pub. L. No. 106-81, § 2(b) (1999), has no bearing on this case because "the main purpose of the bill was to standardize the use of 9-1-1 for emergency calls." See Respondent's Brief at 20. They seem to have missed the point.

Congress made the deployment of wireless networks a national priority so 9-1-1 calls could be made anywhere with any phone. That priority is frustrated by the third circuit's "all carriers" requirement, because it allows local officials to keep most providers out of their municipalities. The resulting patchwork would deprive many users of service at many locations. As a result, 9-1-1 service would not be anywhere near as ubiquitous as the Public Safety Act intends. That impact of the court of appeals' decision on Congress' life-saving goals is but one of several reasons why this case is important enough to warrant Supreme Court review.

Indeed, the exceptional importance of this case has been confirmed by the filing of motions for leave to file *amicus* briefs on behalf of five major competitors of Omnipoint. This issue is tremendously important to the entire wireless communications industry and the 80 million subscribers they represent.

CONCLUSION

Accordingly, the petition for a writ of certiorari should be granted.

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